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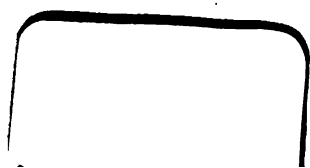
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**SIX ESSAYS**  
**ON**  
**COMMONS PRESERVATION:**

WRITTEN IN COMPETITION FOR PRIZES OFFERED BY

**HENRY W. PEEK, ESQ.,**

OF WIMBLEDON HOUSE.

CONTAINING A LEGAL AND HISTORICAL EXAMINATION OF MANORIAL RIGHTS AND  
CUSTOMS, WITH A VIEW TO THE PRESERVATION OF COMMONS  
NEAR GREAT TOWNS.

BY

**JOHN M. MAIDLOW, M.A., LINCOLN'S INN, BARRISTER-AT-LAW,  
FELLOW OF QUEEN'S COLLEGE, OXFORD, AND LATE ELDON LAW  
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**WILLIAM PHIPSON BEALE, LINCOLN'S INN.**

(TO WHOM THE SECOND PRIZE WAS AWARDED.)

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## PREFACE.

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THE Six Essays contained in this volume, on the law relating to Commons and Open Spaces, were written by their authors in competition for prizes offered by Mr. Henry William Peek, of Wimbledon House, S.W. It is by his wish, and as one of the judges selected to award the prizes, that I preface a few words, to explain his objects in eliciting these treatises, and in now presenting them to the public.

Two years ago, in 1865, Earl Spencer, as Lord of the Manor of Wimbledon, announced his intention to dedicate to the use and benefit of the public the greater portion of Wimbledon Common. In bringing this proposal before the copyholders and inhabitants of Wimbledon, he pointed out the great changes produced within the last few years by the growth of a large suburban population in the neighbourhood of the Common, and the grave responsibilities and duties entailed upon him as Lord of the Manor; that however anxious he had been to fulfil those duties in a disinterested and unselfish manner, and to consult the interests of the place when they were consistent with his public duty, he had found his powers were inadequate to cope with the various cases in which complaint had been made to him by the inhabitants and others, in relation chiefly to the want of drainage, to encroach-

ments on the Common, to rubbish that disfigured it, and to gipsies and tramps who frequented it, and generally as to the want of improvement and management of the Common.

The scheme which he propounded for remedying these evils, and which was afterwards amplified in a Bill presented to Parliament, involved the sale of a large part of the Common, and chiefly of that portion of it known as Putney Heath, lying on the right hand of the London and Kingston road. With the money thus obtained, the remaining portion of the Common, consisting of 680 out of 1000 acres, was to be fenced, drained, and otherwise improved. The rights of any commoners or copyholders of turning out cattle or sheep on the Common, or of cutting turf, or digging gravel, were to be bought up and extinguished. The management of the park was to be vested in trustees, of whom one was to be the Lord of the Manor, another to be nominated by the Crown, and the third by the Inclosure Commissioners. The trustees thus appointed were to have power to make by-laws for the management and regulation of the Common, for removing and preventing nuisances, and generally for watching over and protecting the interests of the Common. They were also to let the pasturage of the Common, and to work or let the gravel-pits; and the proceeds thus obtained were to be applied, first, in payment of a rent-charge to the Lord of the Manor, calculated upon the value of his previous receipts from gravel, and the remainder to the current expenses of maintenance, or to the future improvement of the Common.

The trustees were to be empowered to grant the



## PREFACE.

temporary and exclusive use of the Common, or any part of it, to the National Rifle Association, which, as is well known, has annually held its meetings on the Common.

This proposal on the part of the Lord of the Manor was founded on legal advice that he was practically owner in fee of the Common, that he could dispose of it in the same manner as he had disposed of his inclosed demesne lands, without the legal consent of the commoners. In this view of his legal position there could not be a doubt as to the generous nature of the offer or of the intentions which actuated him; but, on the other hand, it soon became apparent that there were those who took a different view of the rights of the Lord, and as many of the details of the scheme were not of a nature to be satisfactory to the residents on the Common and in the neighbourhood, these differences were not long in making themselves heard.

It is an old saying that no one should look a gift-horse in the mouth, but when the proposal was in fact to give to the public and to the residents two-thirds of that which they had always enjoyed without disturbance, and without the slightest expectation that they would ever be interfered with, or that any value attached to the ownership of the Common, it was not matter for surprize that those who were most interested should scan the proposal with much care, and criticise its details with freedom. A committee of the commoners and residents of Wimbledon was formed to watch over their interests, and with the object not of opposing the scheme *in toto*, but of obtaining a modification of many important details which in their

opinion were unnecessary or injurious to the residents and the public. This committee, of which Mr. Peek was a leading member, entered into an investigation as to the legal position of the lord of the manor and the commoners, which confirmed them in the view which has already been adverted to.

Early in the Session of 1865, Mr. Doulton, M.P., moved in the House of Commons for a committee to inquire into the condition of the Commons and Open Spaces in the neighbourhood of the Metropolis. In the discussion which ensued much was said about the proposal respecting Wimbledon Common, and it was arranged that before the Bill was read a second time there should be a preliminary inquiry into the merits of the scheme by the committee which was granted to Mr. Doulton. Before this committee (of which I was personally a member) evidence was given by Earl Spencer, his legal adviser, and others who adopted the same view, on the one hand, and by several of the Commoners and residents at Wimbledon, including some legal gentlemen, on the other hand. On the part of the lord of the manor it was contended that he was absolutely the owner in fee of the soil of the Common, and could practically do with it as he wished, that the rights of the commoners were so few in number and so slight in value as to be unworthy of consideration, and as offering no substantial check to his power; while the public were, as far as their legal position was concerned, in the hands of the lord of the manor, having no rights whatever; and that in this view the proposed scheme ought to be accepted without cavil. On the other hand, the commoners asserted with

equal confidence their right to be consulted upon the disposition of the Common; they denied the rights contended for by the lord of the manor; they claimed for themselves such rights over the Common as were sufficient to prevent any inclosure; they asked for a share in the management and control of the Common, as being the persons mainly interested in its being properly maintained and cared for; they alleged a decided preference for an open stretch of wild uncultivated land to a fenced park, however well drained, planted, and turfed. They offered to raise money in the neighbourhood for such drainage as was required, and they asserted that any sale of land for the purpose of compensating the commoners' rights was unnecessary, as their rights were in no way a detriment to the Common, but rather a safeguard to prevent its being at any future time improperly dealt with.

It was obviously impossible for the Committee to decide questions involving disputed points of law, nor did it seem necessary to solve them.

It appeared, however, that apart from the mere question of taste as between a free common and an inclosed park, there was great reason in the objection raised by the commoners. If the Common were suffered to remain open, not only would the expense of the fence be saved, but there would be no occasion to compensate the commoners who had never desired compensation, and whose rights did not appear in any way prejudicial to the public. The inhabitants declared themselves to be willing to raise funds for draining the Common, and to be rated for the expense of more efficiently watching it and preventing nuisances. Under

these circumstances the Committee advised : (1.) That it was not expedient that Wimbledon Common should be fenced round or inclosed, or that the existing rights should be extinguished ; and (2.) That it was not necessary and would be undesirable that any part of the Common should be sold. After these recommendations, and upon an understanding that the fencing of the Common should be dispensed with, the bill was read a second time in the House of Commons ; but subsequently, and before reference to a Select Committee, it was withdrawn.

In the meantime Mr. Doulton's Committee proceeded with their inquiry into other Commons and Open Spaces round London. Evidence was given before them as to the condition, physical and legal, of many of the most important of these districts, such as Barnes, Wandsworth, Hampstead, Plumstead, Epping, Blackheath, and others. In all of these the same difficulties were found as in the case of Wimbledon. There was great divergence of opinion as to the legal position of the lords of manors, of the commoners or copyholders, and of the public. Apart, however, from the question of strict right, it was found that the use of the Commons by the public had in practice been mainly secured by the existence of the rights of copyholders and commoners, which in most cases were maintained for the purpose of securing the Commons against inclosure, and were exercised adversely to the interests or pretensions of the lords of manors. These rights had hitherto prevented inclosure ; and there was reason to hope that they would still continue to do so, although in some cases, owing to the great temptations arising from the increased value of

the Commons as building land, legal difficulties had been disregarded, and persons had inclosed at the risk of being subsequently interfered with. It was found, however, that at law the possession of these rights of Common did not give power to the holders to interfere in the control and management of the Commons, or to prevent nuisances. The lords of manors were, or claimed to be, the only persons who could deal with such matters; and where a large population had grown up in the neighbourhood, it was found that in many cases the evils increased to such an extent that it was beyond the power or means of the lords of manors effectually to cope with them. In almost all cases of metropolitan Commons it was found that the surface had been greatly deteriorated and disfigured by excessive and careless digging of gravel-pits, or by the collection of nuisances, the deposits of cinder and dust heaps, and manure, or by the firing of gorse or brushwood. Complaints also were made that tramps and bad characters frequented the Commons without interference of the police. In many cases the lords of manors admitted their inability to deal with these cases, even where they had the will; in others it was apparent that there was neither the will nor the means to check them, as it had been found that the accumulation of nuisances had often induced the commoners and residents to join in an inclosure rather than submit longer to unabated evils. It was also found that many of the Commons had been intersected by railways, which greatly destroyed their beauty and value, and that in all cases there was the want of a properly constituted body to look after the interest of the public.

The Committee came to a conclusion, among others, that there were rights subsisting over most, if not all, of the suburban Commons, sufficient to prevent inclosure if put in force with that object; that these rights, though in many cases falling into disuse in consequence of the growth of population in the neighbourhood, were still valid at law, and could be maintained by those who were interested in so doing; that it was safe to leave these questions of law to be dealt with in the law-courts whenever they should be raised; but that in the meantime the inducements for inclosure would be greatly diminished, and the incentives to persons to resist inclosure increased, if means were provided for the better regulation of the Commons, so as to prevent their becoming nuisances to persons living in their vicinity. They advised, with this object, a measure which would provide the machinery for arranging schemes of management and control of Commons, on application of commoners or other persons interested, which would have the effect of removing the evil complained of, and give the local residents an interest in maintaining these Commons. They rejected a larger scheme for the purchase of the soil of the Commons and the sale of parts of them, believing that it was inadvisable to purchase rights which had hitherto been of little or no value, but which, in the assumption of a power to inclose, would be of a very great value, or to sell any considerable portion of the Commons, till every other means of settling the question had been fairly exhausted.

The Report of this Committee, and the evidence taken before it, led to important results. In the course

of the following autumn the Commons Preservation Society was formed for the purpose of carrying those recommendations into effect, and generally to watch the interests of the public in relation to the Commons round London.

In the following Session of 1866, Mr. William Cowper, then Chairman of the Office of Works, brought in a bill as a Government measure framed upon the above Report; and, with some important modifications, this eventually passed through Parliament, and is known as "The Metropolitan Commons Act, 1866." This Act laid down the important principle that no inclosure of any Common within the Metropolitan Police area should take place through the agency of the Inclosure Commissioners; and it gave that body important powers for settling schemes for management and control of Commons, on application of commoners or other persons interested. It left undealt with the questions of law between the lords of manors, commoners, and the public. It was and is believed that in many cases the Act will be brought into operation by consent of the persons interested without raising these issues of law.

In furtherance of the principle of this Act it appeared to Mr. Peek, who as a commoner and resident is greatly interested in its application to Wimbledon Common, and in the settlement of a scheme which could meet with the approval of the lord of the manor, the commoners, and the public, that this might be greatly facilitated if public attention were more specially directed to the subject, and particularly if the legal questions surrounding it were thoroughly investigated. With this view he offered, through the

medium of the Commons Preservation Society, four prizes for the best Essays on the subject of Commons; two of £100 and £50 for Essays on the law relating to them, and the other two of £50 and £25 for Essays on the moral and sanitary aspect of the question. He selected as judges the Right Hon. William Cowper, M.P., Mr. Charles Buxton, M.P., Mr. John Murray, Mr. Joseph Burrell, and myself. Forty-six Essays were sent in. We awarded the first and second prizes on the legal branch to Mr. J. M. Maidlow and Mr. Beale; and we recommended to Mr. Peek four others which appeared to be ably written, and to contain much information on the subject. The two prizes on the other branch of the subject we awarded to Mr. Howard S. Pearson and Mr. Edward Matthewman. Mr. Peek was liberal enough to offer an additional prize of £25 to each of the four writers whose Essays were recommended by us as worthy of his attention, and they are now printed in this volume (in the alphabetical order of their names), in addition to the other two Prize Essays on the law relating to Commons. I have only to add in conclusion that the judges, in selecting the following Essays, do not commit themselves to all the views contained in them. It will be seen that there is some difference of opinion between the writers on certain important questions; but all agree that our Commons are subject to various and valuable rights, known to and recognised by the law, and they conclusively negative the assertion that a Common is the private property of the Lord of the Manor.

It is probable the Inclosure Acts have given rise to some misconception. These Acts had in view public



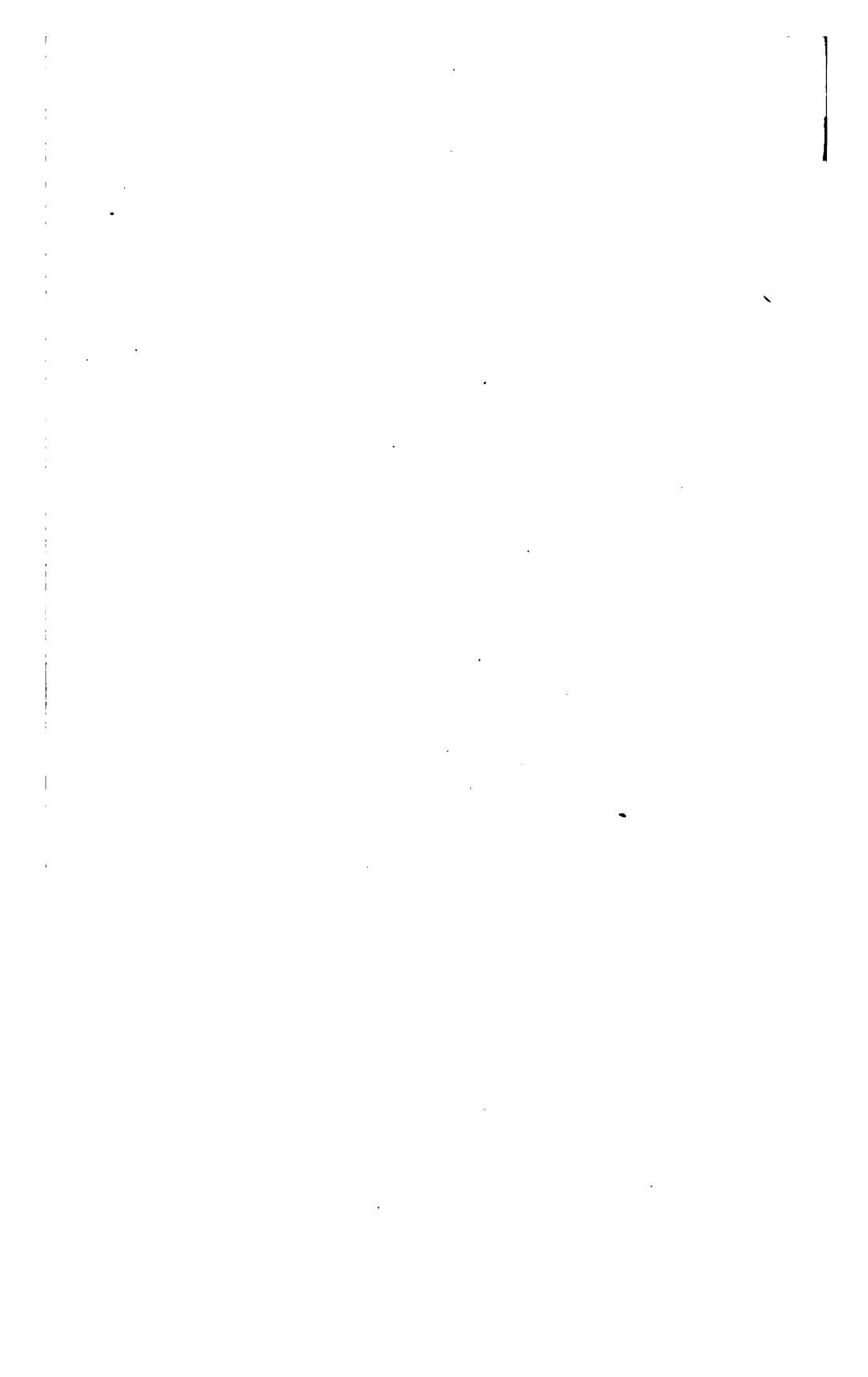
objects, which for the time and in certain parts of the country were of paramount importance. In order to increase the growth of corn and other produce for the food of the people, facilities were given for the cultivation of waste lands, and the cultivator was rewarded with the exclusive property in the land as the reward for his labour and capital. Near large towns a different policy is now recognised as expedient. It is considered in these cases essential to the welfare of a densely crowded population, that not only should a limit be put to the building area, but that spaces should be preserved for public recreation. "The Metropolitan Commons Act" (to which I have already adverted) repealed the Inclosure Acts, as far as regards their operation within fifteen miles of London, and provided for the local management of Commons within that area; the view of Parliament in passing it, was that the State has never entirely abandoned its right to control the use of the waste lands of the country, and therefore that it was incumbent on it to provide a machinery for the protection of those tracts which had been shown to be of essential importance to the public, at the same time that they were peculiarly exposed to spoliation and deterioration. It was objected by some persons that injustice would be done by preventing inclosure. The benefit to individuals from the operation of the Inclosure Acts, instead of being regarded as an accessory result only of the policy which dictated those Acts, was asserted as their main object and as the indisputable right of the claimants. Parliament, however, only put a stop to a practice created by itself for a public purpose in those places where it was no longer beneficial to the com-

munity that it should be exercised. It was further objected that the only proper means of preserving open spaces for the community was by a system of purchase and compensation. The committee, however, as I have already stated, had refused their sanction to such a measure, which would have been considered as an abandonment of public rights and as giving authority to claims which in their opinion were destitute of foundation. The passing of this Act cannot be said to have concluded the question; it has yet to be applied to the numerous cases of commons within the prescribed area. It has also happened that pending this legislation several cases have occurred in which attempts have been made to inclose without the authority of Parliament. These inclosures are believed to be illegal, and have been in most cases resisted in the interest of the public by persons locally concerned in them. It is not, however, to Courts of Law alone that we should look for the complete settlement of the question. It may be that technical rules, adopted by the Courts of Law at a time when the great interests now at stake were not jeopardized or even noticed, will be found to stand in opposition to manifest historical justice and to the best interests of the State. In that case it will be for Parliament to consider whether they should not be swept away rather than that by a liberal expenditure of public money in particular cases great principles should be prejudiced for ever after in all other cases of the same kind. It may also hereafter be necessary for the Legislature to devise remedies more appropriate and speedy than those which are now at hand for the purpose of preventing and removing encroachments, and to proceed further in the

direction already pointed out by the Act of 1866. The subject is indeed very large, and is by no means exhausted even by the Essays of undoubted ability now offered to the public. It will probably receive further light from the coming arguments and decisions in the Courts of Law to which I have already adverted. On the whole, it appears to the judges that the following Essays afford a substantial vindication of the policy adopted by Parliament in that Act, and they think that Mr. Peek has rendered a valuable service in stimulating a searching inquiry into the principles involved in the subject. He will doubtless feel amply recompensed should the present volume contribute in any degree to secure to the public the use of those numerous and beautiful Commons which they have from time immemorial enjoyed, and indefinitely postpone the day when it could be said with truth

“Our fenceless fields the sons of wealth divide,  
And e’en the bare-worn Common is denied.”

G. SHAW LEFEVRE.



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**ESSAY I.**  
**ON**  
**THE LAW OF**  
**COMMONS AND OPEN SPACES,**  
**AND THE**  
**RIGHTS OF THE PUBLIC THEREIN.**

~~~~~  
" 'A babbled of green fields.'"  
~~~~~

**By JOHN M. MAIDLOW, Esq., M.A.,**  
**OF LINCOLN'S INN, BARRISTER-AT-LAW,**  
**FELLOW OF QUEEN'S COLLEGE, AND LATE ELDON LAW SCHOLAR IN**  
**THE UNIVERSITY OF OXFORD.**





## ESSAY I.

---

ONE of the principal features which, at the present day, characterize the struggle for life among our ever-increasing population is the demand for room. Railways are said to annihilate space, and they do so in more ways than one; and our poor, evicted by them and by other great public works from their wonted dwellings, are crowded together into narrow retreats where the blessings of light and air are but scantily supplied. The rich, on the other hand, taught to value the luxury of a country residence, and finding it possible to live outside the city without neglecting aught of their commercial or professional duties, outbid one another for suburban dwellings, until all fields and meadows for miles round become covered with houses, more or less closely built, and the fresh air of the open land is further and further removed from the heart and centre of the town.

Under these circumstances it would seem probable that in course of time exercise and recreation other than that which can be obtained from traversing hard macadamized roads or stone-laid footways, would become to the mass of city-dwellers an unknown or rare enjoyment: but we have had hitherto the consolation of thinking that in every direction around our metropolis, and similarly around our other great cities, there were open spaces, some of them of singular beauty and large extent, which from the nature of the property in them could never be inclosed or built upon, but that over these the public would ever be able to enjoy, as from time immemorial they had enjoyed, the privilege of roaming far and wide, without hindrance or interruption; and that so, let the lanes and alleys be crowded never so much, and the desert of bricks be spread as far away as it might, there would still of necessity be left these oases there, on which for any number of travellers there would always be found the refreshment of free light and air, and the elasticity of the green grass. But recently we have been startled by claims on the part of individuals, which, if well founded and insisted upon to the utmost, would deprive us of

these last reserves upon which we have counted in the prospect of future events, would rob us of the inheritance which we thought we had derived from our forefathers, and would throw us back upon our individual acquisitions, as portionless orphans. The disturbance of our fancied security arises thus: The lords of the various districts, or manors as they are called, in which these open spaces or commons lie, and who have, as their name implies, a considerable interest in the question, assert that they have, by reason of changed times and altered circumstances, and by the aid of custom, and of several legislative enactments, such power and right of appropriating and inclosing these commons, that the liberty of the public would be thereby wholly destroyed, or to a very serious extent abridged. It becomes then of very great importance to inquire into the validity of such pretensions, and ascertain, if possible, how far they are based on legal foundations; for, in the general uncertainty which prevails upon the subject, assumptions are made and claims pass unchallenged which the light of a clear investigation would dissipate and overthrow,—*Omne ignotum pro mirifico*.

Besides, the time has come when the overwhelming magnitude of the subject, in respect to the general health of our over-crowded cities, will no longer allow that it should be left to the contingencies of circumstance, or the arrangements and caprice of a few private individuals, to decide whether or not these open spaces shall remain inviolate; it is a matter of public interest, in which, on the soundest principles of political economy, the Legislature is bound to interfere, and to secure to the public this necessity of life; in the same way as it provides for the building and maintenance of lighthouses and other necessities of navigation, equips expeditions for geographical or scientific explorations, and, in a variety of other cases, interposes where important public benefits are to be secured, while yet, from want of the power, or want of special interest in a project which would not be naturally or spontaneously attended with profit, no individual or body of individuals can be found to perform the task.

In order to satisfy ourselves that we are doing no private injustice while we seek a public good, it is necessary definitely to fix the extent and character of the rights claimed; and, well

informed of the true relations of the parties concerned, we shall be able fairly to judge of the question and avoid the danger of unduly passing over rights which are seemingly small, while allowing, in all their self-assumed and exaggerated importance, claims which are more vehemently urged.

We propose, then, to consider :—

- I. What are the general rights of the several persons interested in these open common-lands which the public have hitherto enjoyed the privilege of using freely for exercise and recreation.
  - II. To what extent there was ever a power on the part of the lord to inclose or appropriate to himself a part or the whole of such common-lands.
  - III. Whether that power has been increased in the course of years by changing times and circumstances.
  - IV. Whether *the public* have or have not, by their immemorial enjoyment of the privileges we have spoken of, obtained a right to have the commons left open and uninclosed for ever.
  - V. The policy which has generally influenced the Legislature in respect of the inclosures of open spaces ; and,
- Lastly, The course which the Legislature has recently adopted with regard to Metropolitan Commons.

Inasmuch, however, as it is with particular reference to the Metropolis that we are now writing (the necessities of which are most urgent), and to the claims of lords of manors in its vicinity to inclose and appropriate the common-lands, we shall confine ourselves, amid the limitless details which the above topics involve, to such matters as are of special application to the open spaces in the metropolitan area, having regard to the present state of the question in respect of these, as exhibited in the Report of the Select Committee of the House of Commons appointed to inquire into the matter in the year 1865.

#### I. THE RIGHTS OF THE SEVERAL PERSONS INTERESTED IN THE OPEN AND COMMON LANDS.

These lands form part of what are called manors, an old

word, in Latin *manerium*, which some would derive from *manere*, as having reference to the settled abode or mansion-house of the lord, and others from the French *mesner*, to govern, or to guide, because the lord would have jurisdiction within the territory; and "this last," says the author of 'The Complete Copyholder,' "I hold to be the most probable etymology, for a manor signifies jurisdiction, and royalty incorporate, rather than the land or site."

The origin of all manors lay in grants of territory of considerable size made to individuals, or, in some cases, to religious houses, to hold as their own several estate. Before the Norman Conquest these tracts, thus separated from the public or folkland, as it was called, were held by the donees as their independent property, and the owners could do with them whatsoever they chose; they held of no one, but stood by themselves in their own individual right (*Allen's 'Prerogative of the Crown,'* pp. 135-155). Of that character were the grants of the manor of Hampstead by Kings Edgar and Ethelred, the original charters of which are still extant. After the Norman Conquest all grants of a similar description were, according to the feudal system which the Normans brought with them, made to be holden of the king; and so would differ from the independent or allodial tenure upon which lands granted previously to the Conquest were held: but in the year 1086, in consequence of the terror caused by a threatened invasion of the Danes, all the "principal landholders in England," as the Saxon Chronicle has it, (which would mean the independent holders, the holders of lands separated from the folkland in the Saxon times, the holders of the *bôk*land, the book or charter land, as it was called,) in order to avail themselves of the military system of the Normans, which, now that the Saxon constitution was broken up, was all that remained for the protection of the country, submitted their lands to the yoke of military tenure, and became vassals of King William, and did homage and fealty to his person.

It will make no difference, therefore, for our present purpose, whether a manor was created before or after the Conquest, as in either case the grantee of land came to hold it of the king, and we may state it broadly that all manors take their origin from grants of territory to be holden in severalty of the king.

Where we find in the present day the crown the lord of a manor, it is because the manor has by escheat, donation, or otherwise, come again into the hands of the sovereign.

The grantee from the king, for the most part a military chief, would, out of the territory so granted to him, parcel out to his followers certain portions which they should hold as their own property, in the same way as he had himself received from the king; and, upon this second grant, would be able to impose any terms he pleased upon his subordinates; the greater part would be dedicated to "arms and ambition," and would be held by his martial supporters upon the honourable tenure of military service; whilst another part would be allotted to an inferior caste, to be held by certain fixed rents and services upon what was called socage tenure, which some writers ("for the learned," says Serjeant Hayes, "are not agreed upon it") interpret to mean *plough* service (*Hayes on Conveyancing*, p. 6). Both of these classes would be comprehended in the modern freeholders, and would hold of their grantor, who was from his position called their lord, as he held from the king above him; and these freeholders again could parcel out their estate, and grant it away to others to hold of them as lords; for, such was the feudal system, to borrow one of Plato's metaphors, as if the king transmitted a magnetic virtue, enabling his tenant to become a lord in turn, and so, by a series of sub-infeudations, to carry on the principle to the extremest limit of subdivision, all holding of the king, but the king himself having no superior but God Almighty. "Omnes quidem sub eo, et ipse sub nullo, nisi tantum sub Deo" (*Co. Litt.* 1).

The form of the grant which the lord would make to his freeholders would be to A. and his heirs to hold of the lord and his heirs, as of the lord's manerium, upon the rents, services, and conditions which might be specified in the particular grant; and the complex estate, comprehending the mansion-house and lands which the lord did not grant away, but reserved for himself as his own immediate property, together with the rents and services fixed in the grants, came to be called either, as we have said, after the mansion-house round which the whole was gathered, or the rule which the lordship implied, a manerium or manor.

Besides, however, the freeholders to the manor there were

villeins or serfs of the lord, who cultivated the lands which he had reserved to himself, and were attached to the soil rather by "the chain of slavery than by a bond of tenure." This class (which was the origin of the modern copyholders), were originally tenants at the absolute will of the lord, but in the course of years they became of extreme importance in the country, and Sir Edward Coke says that in his time one-third of the land in England was copyhold. "For though very meanly descended, they came of an ancient house," and round them had grown up the all-powerful custom, "the life and soul of the copyholder," and they held at the will of the lord, *according to the custom of the manor*; and "now," says Coke, "they stand upon a sure ground, now they weigh not their lord's displeasure, and shake not at every sudden blast of wind; they eat, drink, and sleep securely, only having a special care to the main chance, viz. to perform carefully what duties and services soever their tenure doth exact and the custom doth require; then let lord frown, the copyholder cares not, knowing himself safe, and not within the danger."

We may observe here that in modern times, practically, no new manors can be created; the system of sub-tenures, which we have described, was in the course of two centuries found to work badly; innumerable petty lords sprang up between the great lords and the actual tenants of the soil, and intercepted the fruits and privileges of tenure; and accordingly, in A.D. 1290, the statute known as *Quia Emptores* was passed, which in effect provided that, upon alienation of any lands held of a lord other than the king, the alienation should amount to a renunciation of *dominium* for ever, so that the alienee would take, as it were, the place of the alienor, and stand on the same level upon which *he* previously stood with regard to the lord immediately above him, instead of adding another link to the chain of sub-tenure. And in A.D. 1324, by the statute *De Prerogativâ Regis*, the same prohibition was extended to those who held immediately of the king, to the tenants *in capite* as they were called; so that it was henceforth impossible for one manor to be made, as it were, the parent of manors below it. These statutes we may say fixed the *infimæ species* in the realm of manors. The manors however which had been previously created continued to exist,

and still exist, unaltered, except that by statute of 2 Car. II. c. 24, the military tenure was changed into socage tenure, by which indeed all freehold lands, whether comprised in manors or not, are at the present day held.

The land within the manor was thus, as we have seen, granted partly to freeholders, and partly reserved by the lord as his demesne, and cultivated either by himself or his villeins; but, over and above, there remained a surplus, uncultivated, which was called the lord's waste, as it lay neglected by the lord, "because he had before taken into his demesne what he had need of" (*Potter v. Sir Henry North*, 1 Vent. 395).

It is with this waste, and the persons generally interested in it, that we have to deal.

But first let us look for a moment at the courts which were more or less intimately connected with a manor. There were three: the Court Leet, the Court Baron, and the Customary Court.

The Court Leet was a court which the lord of some manors was entitled to hold by virtue of the special charter of the king, for the administration of justice in criminal matters; at this all persons resident in the precinct, including of course freeholders of the manor, were obliged (with certain privileged exceptions) to attend, and, out of the persons present, a jury of twelve was chosen to decide the point at issue. This court has fallen into disuse in favour of the jurisdiction of the justices of the peace (*Sir Geo. Colebrooke v. Elliot*, 3 Burr. p. 1864).

The Court Baron was by the Common Law necessarily incident to manors, and was an inseparable concomitant, so that if there were no Courts Baron there was no manor; it was the court of the freeholders, "who in the old charters and records are referred to by the name of barons, as the Barons of London, the Barons of the Cinque Ports, will signify the freemen of London and of the Cinque Ports" (*Co. Litt.* 58). In this court all the freeholders are bound to attend, and do suit of court, and there they sit as judges, to decide various questions which may have arisen in respect of the manor, the interest of the lord or of his tenants, or the mutual relations between them.

The Customary Court is a court of the copyholders, where in like manner all copyholders are bound to attend and do suit

of court; but in this the lord or his steward is judge, and the province of the court is confined to the business of the copyhold tenements and the various relations between the lord and his copyholders.

The exact limits of the jurisdiction of the Courts Baron and Customary are settled by custom, which varies in each manor, and the stewards of the manor at each court deliver the charge to the suitors declaring the several matters which they are to discuss, and to present to the knowledge of the lord. A custom would be good for these courts to make by-laws for the better government of the manor, or the waste land in it, but they could not claim to affect the property of any of the tenants, so as for instance wholly to deprive them of their right of common on the waste (*Erbury v. Latton*, 1 Leonard, 190). So they may by custom bind the lord; for a custom would be good for a copyholder to name his successor, and if the lord should refuse to admit the nominee, that the tenants in the Customary Court should set a fine, on the payment or tender of which the lord could be compelled to admit (*Rolls v. Mason*, 1 Brownl. 132).

The tenants, as assembled in the Court Baron and Customary Court, are respectively called the Homage: a word properly applicable to the freeholders who were the lord's men (*homines*), but by analogy used of the copyholders. The courts should strictly be kept distinct, but for convenience they are often held together, and then the transactions are only valid and binding on both classes of tenantry, so far as the court really represents both the Court Baron and Customary Court.

Due warning of the intention of holding the courts must be given, to summon the suitors, and this is commonly done by posting a notice on the church doors, for it is not necessary that a special summons should be sent to every tenant; "for if the tenant himself is not resident in the manor, his farmer may send him notice that a court is to be held on such a day (1 Leon. 104, Case 139); and proclamation in court is good notice to a tenant of any matter proclaimed there (*James v. Tutney*, Cro. Car. I. 497).

If there are no freeholders to form a Court Baron (and two is the minimum number), the manor in law ceases to exist, and



becomes only a manor by reputation. This may arise from the freeholds escheating, or a release by the lord of the tenure and services of all freehold tenants, but such extinction of a manor in law will not affect the right to hold the Customary Court for the copyholders (4 Co. 266), as that needs no free tenants; and for other purposes also the manor is considered as if it continued to exist, as to validate certain evidence of boundaries (*Doe d. Molesworth v. Sleeman*, 9 Q. B. 298, cf. 6 Co. 64 b); and the lord may claim such prescriptive privileges as are not affected by the want of freehold tenants and the consequent inability to hold Courts Baron (*Soane v. Ireland*, 10 East, 259); and for the purpose of making title under an Inclosure Act, as lord to a manor, it is not necessary for the owner of the soil to prove that the manor "exists in law, or that he is lord properly so called" (*Smith v. Smith*, 2 Price, 101).

But to return to the consideration of the waste of the manor. Over this the freeholders had, by implication of law, and as incident to the original grant by the lord, rights of common that were attached to, and as it was called *appendant* to, their tenements or holdings.

Other rights of a similar kind might also have been conferred upon the tenant to be enjoyed with his holdings, at any time subsequently to the original grant, not coeval with it, nor by law presumed to have been included in it, but for which a freeholder might, in the absence of an express grant, prescribe, and claim by reason of immemorial usage, as upon a forgotten or lost grant. Such rights connected with the land, but not, as it were, hanging on thereto, were called *appurtenant*; and rights of common might also be claimed, as appurtenant to land which was not held of the manor—claimed by persons outside and strangers to the manor—and these might, like the freehold tenants, found their claim upon an express grant by the lord, or upon immemorial user, from which such grant could be presumed. Claimants of this kind are very numerous in the present day, and their rights are as valid as those of the freeholders of the manor, properly so called.

Again, rights of common may also be claimed quite irrespectively of land, and by strangers to a manor—such are called rights of common *in gross*; *i. e.* at large, not linked to or in

connection with land, and may be founded either upon actual or implied grant; but they can be claimed only by those who are capable of taking a grant. Indefinite bodies, such as "inhabitants," are therefore excluded (*Constable v. Nicholson*, 14 C. B. (N. S.) 230, following *Gateward's Case*, 6 Co. 59 b), but a lay corporation, as a mayor and burgesses of a borough, or a parson to a church, may so claim; and it would seem an individual might say that he and all his ancestors, whose heir he was, from time immemorial, had had common, &c. (*Mellor v. Spateman*, 1 Saund. 343).<sup>a</sup> The right so claimed by a corporation exists for the benefit of each individual member (*King v. Warkworth*, 1 Maule and Sel. 472); and the Court of Chancery, in *Wright v. Hobert* (9 Mod. 65), made a decree in favour of a grant, by which forty acres of pasture were conveyed to trustees, "so that as many of the inhabitants of the village of W — as could buy three cows might put them to grass for a certain season of the year, after which the pasture was to be in common for all the inhabitants until Ladyday, when it was to be inclosed for raising the fresh grass."

Rights of common, in the special forms which have been mentioned, could not be claimed by copyholders, as, by reason of the baseness of their estate, they had no permanent interest in their lands which would enable them to claim such rights as appendant or appurtenant thereto; nor could they again, as being a flux body, having neither entirety nor permanence, claim the same in gross. "But necessity controls this," says Lord Denman (*Rogers v. Brenton*, 10 Q. B. 26); "the common of pasture in itself is an interest; it is taking a profit from the soil: it is properly matter of prescription: if the copyholders of one manor will claim it in the wastes of another, they must, because they can, do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables them to prescribe; but if they claim it in his wastes, they cannot prescribe it in their own name and rights, by reason of their want of permanence, nor can they in their lord's name, for he cannot claim common in his own land;

<sup>a</sup> A recent case (*Willingale v. Maitland*, L. R. 3 Eq. 103), decides that "inhabitants" can under a royal charter take grants of rights of common in gross,

as by the royal grant itself they are constituted a corporation, and enabled to take in that capacity.

they are therefore, from necessity, allowed to claim by custom. But what is the necessity? That growing out of the original compact, when they received permission to cultivate for their own benefit, and on condition of certain services, certain portions of the lord's land. That compact included the right of common on the lord's waste; and the law will not suffer that right to want a legal character, and so be without the means of its legal enforcement, though at the expense of strict legal reasoning: "and, accordingly, we find that in nearly all manors the copyholders are able to claim rights of common of a very extensive kind; dependent indeed upon the custom of the manor, but when thus determined, of no less indisputable title than the similar rights of freeholders.

It was in ancient times essential, in order to establish the validity of any claim to common, whether as appendant, appurtenant, or in gross, and so likewise if made by custom, that in the absence of an express grant, proof of immemorial enjoyment should be given. For a long series of years indeed, before the passing of the Prescription Act, uninterrupted enjoyment for a period of twenty years was allowed, in the absence of counter evidence, to be sufficient to raise a presumption that the enjoyment *had* been immemorial; but this presumption could be rebutted, and the right defeated, by showing that the enjoyment had commenced within what was called the period of legal memory (*i. e.* the period from the return of Richard Cœur de Lion from the Holy Land). To remedy this inconvenience, and to shorten in effect the period of prescription, the statute 2 & 3 Wm. IV. c. 71 was passed.

The first section of this statute, commonly called "The Prescription Act"—after reciting that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," was, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard I., whereby the title to matters that had been long enjoyed was sometimes defeated by showing the commencement of such enjoyment, which was productive of injustice—*enacted* that no "claim which may be lawfully made at the Common Law by custom, prescription, or grant, to any right of common, or other profit or benefit, to be taken or

enjoyed from or upon any land (except such matters and things as are therein specially provided for, and except tithes, rents, and services), shall, where such right, profit, or benefit has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken and enjoyed within the time of legal memory, but that such claim may be defeated in any other way by which the same was then liable to be defeated; and when such right, profit, or benefit has been so taken and enjoyed for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing."

Claims to right of common, appendant and appurtenant, or made by custom, are here included, and common in gross is within the equity of the statute (*per* Lord Wensleydale, *Welcome v. Upton*, 5 M. & W. 404, and 6 M. & W. 543); but as the scope and object of the provision was simply to fix a period of enjoyment, after which the presumption of a grant should arise in those cases in which a grant would have been possible before, —not to alter the law except so far,—an indefinite body of persons, as "inhabitants," who could not claim a common in gross, or take advantage of user to set up a custom, would not now be able to avail themselves of this statute. It is to them inapplicable (*Constable v. Nicholson*, 14 C. B., (N. S.), 230). Further, we may observe here, that the question whether or not the public have acquired the right of using the commons for purposes of recreation will have to be discussed independently of the Prescription Act, and of any aid to be drawn therefrom in favour of the claim, as none of the provisions of the Act extend to rights claimed for mere pleasure (*Mounsey v. Ismay*, 34 L. J. Ex. 52, 56).

But to return. The rights which freeholders can claim as appendant, or appurtenant, or in gross, and the copyholders of the manor can claim by custom, are various:—

*Common of Pasture.*—This, if claimed as appendant, can only be claimed for pasture of beasts which are useful for tillage, such as horses, oxen to plough, and cows and sheep to manure

the land, but not for other animals, such as hogs, goats, or geese. In strictness it was confined to arable land; but the fact of a house having been built upon part of the land, or part of it being converted into meadow or pasture, if there is arable land left, will not destroy the original right (*Tyrringham's Case*, 4 Co. 36).

Common of pasture appurtenant being claimed, as we have seen, by grant or prescription, *i. e.* upon the ground of an actual or presumed grant, need not be restricted to such beasts only as are usually termed commonable, but may extend to beasts not commonable, as swine, goats, and geese (*Co. Litt.* 122 a); and it is not necessarily appurtenant to arable land, but may be claimed in respect of any kind of land.

A common in gross is not, except by the special grant, subject to any restriction as to the species of beasts to be put on the common.

Every claim for common of pasture (unless it be a claim for the sole pasture, which we shall see may in some cases be lawfully made), must be in some way defined and limited, as "it cannot be law that the owner of a messuage, with only a square yard of land annexed to it, might collect as many cattle as he can, from all parts of the kingdom, and stock them on the common" (*Benson v. Chester*, 8 T. R. 401); and "the notion of the right of common for cattle, *sans nombre* (without number), in the latitude in which it was formerly understood, has," says Willes, C. J. (*Willes*, 232), "long since been exploded." When there is this common of pasture *sans nombre*, it must be taken as put merely in opposition to the right to a certain fixed number of beasts, and would be restricted to such beasts as were *levant* and *couchant*, as it is called, upon a certain spot (the mayor and burgesses of a town, claiming in gross, were allowed to claim for the cattle *levant* and *couchant* within the town, *Mellor v. Spateman*, 1 Saund. 343), or would be subject to the prior rights of the lord and other commoners, so that it would not arise except in respect to the surplus (*Co. Litt.* 122 a).

The restriction of "levancy and couchancy" which is generally applicable when no number is fixed or referred to, is differently interpreted; the phrase originally meant the abode for a single night, but has come to imply the probability

of that abode being habitual. Sometimes it is spoken of as if it meant the cattle actually used for the purpose of maintaining and cultivating the inclosed ground, but this is probably only applicable when common appendant is claimed, and the true explanation is found in the observations of Parke, B. (in *Whitlock v. Hutchinson*, 2 Moo. and Rob. 205), that the proper test of levancy and couchancy was, whether the cattle were such as the winter eatage of the ancient tenement, together with the hay and other produce obtained from it during the summer, was capable of maintaining; "for although," says Bayley, J., in *Cheeseman v. Hardham* (1 B. and Ald. 702), "there are cases in which foddering in a yard makes levancy and couchancy, the meaning is, foddering with stubble, &c. produced from the messuage or land itself to which the yard belongs."

A man may, it seems, use his common appendant with the cattle of another, if he employs those cattle to the advantage of his own soil, but, with that exception, he cannot do so, either for money or otherwise (*Fitzherbert*, Nat. Brev. 180 B).

If however the right of common be for a certain fixed number of beasts, there is then nothing to hinder him from putting on the beasts of a stranger, because no one is injured thereby, as the number is ascertained (*Hoskins v. Robins*, 2 Saund. 327).

It was at one time uncertain how far a mere occupier of a tenement could claim to use the right of common in respect of the estate; although it was said (*per* Pigot, 15 Edw. IV. 32) that any occupier of premises to which the right attached might claim to enjoy it so long as it was confined to beasts *levant* and *couchant* there; and a tenant for years could use the common with cattle which were for his household, not with those kept for the purpose of sale (14 H. VI. 6 B); but now by the Prescription Act, sec. 5, occupiers have all the privileges which the owner in fee would have in respect of rights of common attached to or connected with the estate.

But instead of being enjoyed continuously, all the year round, these rights of common of pasture (corresponding rights to which we have seen copyholders can claim by custom), may be limited to certain fixed periods, as in the cases in the books, "all the year saving a certain time, in which the lord uses the land," or

"from the time when the hay is carried off a mead, till Candlemas;" or in a pasture, "from the Feast of St. Augustine till All Saints;" or, as in the case of what are known as Lammas lands, "from the 1st of August (Lammas-day) for 8 months." Lands which are thus held in severalty for a certain period, and only become subject to common rights at the expiration of the separate interests, are called "commonable lands," as opposed to the "common lands" on which the rights of the lord and his tenants are always concurrent. These commonable lands have been the subject of special legislation, as we shall have to notice hereafter.

*Common of Piscary* is the right of fishing, in common with certain other persons, in a particular stream (8 Taunt. 187), and is a right which often arises in connection with manors, but special remark on it does not seem necessary for our present subject.

*Common of Estovers* is, according to Bracton's definition (fol. 231) the right of cutting wood from the estate of another, in the forests, woods, or other waste grounds; and this, he says, must be reasonable, according to the size of the wood or waste on which the right is established, and also the size of the tenement for the benefit of which it is claimed. "Estovers and bote," says Coke, "are all one; estovers are derived from the French word *estover*, *i. e. fovere*, *i. e.* to keep warm, to cherish, to sustain, to defend; and *bote* is an ancient Saxon word, one of whose significations is for reparations. And there are four kinds of estovers—fire-bote, plough-bote, house-bote, and hedge-bote." (*Heydon and Smith's Case*, 13 Co. 68). The right may be a limited one, as "that the trees shall be assigned by the lord or his bailiff, but the lord cannot take all the timber-trees, but ought to leave sufficient for estovers, as otherwise great depopulation would follow, ruin of houses, and decrease of tillage and husbandry." The estovers may be claimed as appendant or appurtenant to the house and land, or in gross (*Co. Litt.* 121, 13), or be claimed by copyholders by custom. A prescription by one seised in fee of a house and land, to have estovers for the repairing of the house, or for the building of a new house upon the land, is good (*Countess of Arundell v. Steere*, quoted *Luttrell's Case*, 4 Co. 86); but if the claim is made for an ancient

house, it will not apply to one newly built, unless rebuilt on the same spot: "just as," says Coke, "if one is bound to find chaplains for a chapel, when the chapel fell, the service would cease, for it ought to be done in a decent and reverent manner, and not at large in the open air; but if it is rebuilt in the same place, where the old one stood, the divine service ought to be performed there, but otherwise if built in a new place." The right is attached to the most durable part, which in law includes the whole, so that a new house may be built on what was the old foundation to the old house; "for as that supported, and in the judgment of the law included, the old house, when it stood, so it shall support and include the new house, and so, in a manner, is a continuance of the old house." And again, "where the alteration of the quality or name of part of the house does not cause any prejudice to the lord of the soil, the estovers remain; and so if a man has estovers, either by grant or prescription, to his house, although he alter the rooms and chambers of his house, so as to make a parlour where it was the hall, or the hall where the parlour was, and the like alterations and qualities, and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed; and although he builds new chimneys, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added." (*Luttrell's Case*, 4 Coke, 86.)

*Common of Turbary* is the right of cutting turves on the soil of another, and may also be appendant, appurtenant, or in gross (*King v. Warkworth*, 1 Maule and Selwyn, 473); but qu. appendant (*per* Justice Lawrence, with assent of Mansfield, C. J., *Grant v. Gunner*, 1 Taunt. 435), and may also be the subject of custom. It cannot be claimed in respect of land, unless there was originally a house upon it, "as turves are only wanted to burn in a house;" but where the right once attached, just as in the case of common of estovers, it would not be destroyed by the destruction of the house, but would remain attached to the soil, so as to become available for the use of any new house which might be erected on the spot.



In all cases the right of common of turbary must, upon the same principle as the other kinds of common, be subject to limitations, either by the requirements of the house, or by a fixed number, or in other ways, to prevent the whole of the turbary of the common being taken, and the pasture altogether destroyed.

So in the case of *Wilson v. Sir Francis Willes* (7 East, 121) in respect of Hampstead Heath, it was held that "a custom that all the customary tenants of a manor, having gardens parcels of their customary tenements respectively, had immemorially, by themselves, their tenants and occupiers, taken and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as had been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion had required," was bad in law, being indefinite, and uncertain, and destructive of the common; and so was also a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements; and, on a similar ground a right of common of turbary claimed *ad libitum*, appurtenant to a cottage, to dig and sell turf as belonging to the house, was held bad, "because a common appertaining to a house ought to be spent on the house, and not sold abroad." (*Valentine v. Penny*, Noy, 145.) A prescription, however, in right of an ancient house to carry away every year as many turves as two men could dig in a day, was allowed, even though it did not appear that the turves were to be used in the house, for the limitation of so many as two men could dig in a day gave sufficient certainty (*Hayward v. Cuningtton*, 1 Lev. 231, quoted in *Clayton v. Corby*, 5 Q. B. 410).

In the case of *Peardon v. Underhill* (16 Q. B. 120), upon an action of trespass, in which the defendant justified under a right of common of turbary claimed from prescription, and by enjoyment for thirty and sixty years, over Gidley Common, whereof the close trespassed upon was part, it was held in accordance with the judgment of Tindal, C. J., in *Maxwell*

v. *Martin* (6 Bingh. 522), that under the Prescription Act it is not necessary to show an actual exercise of the rights on the very spot, but that when it is parcel of a larger tract, it is sufficient to show user over the larger tract.

There is also in some manors *the common right of digging and taking* coals, minerals, sand, gravel, clay, stone, &c., from the lord's soil, and such right, if properly established, is recognised by law (*Co. Litt.* 122 a, and *Duberley v. Page*, 2 T. R. 391), and it is apprehended it may be claimed either as appendant, appurtenant, or in gross, or by the custom of the manor; but the right must be in some way limited, otherwise it cannot be supported, as the owner of a brick-kiln was not allowed to show, from thirty years' enjoyment, a right, in respect of his brick-kiln, to dig clay in the lord's soil, as much as was at any time required by him for making bricks at the brick-kiln, in every year, and at all times of the year (*Clayton v. Corby*, 5 Q. B. 415).

Besides, however, these ordinary rights of common, there are certain special rights belonging to the Crown, in the case of forest land, to which, for the sake of Epping Forest, we will refer. Even when the soil belongs not to the Crown, but to private owners, the Crown has nevertheless the privilege of keeping an unlimited stock of deer, and also wild boars, wolves, and hares in the forest, with a right to have vert and browse kept sufficient for those animals; it has also the power of enforcing a fence-month fifteen days before and fifteen days after old Midsummer-day, during which the whole of the commoners' stock is removed; and has power to compel all inclosures in the forest to be kept at a height not exceeding four feet, that the deer may have free range.

We have hitherto been considering the rights of commoners in respect of waste lands; but subject thereto, or rather concurrently with them, the lord would have for himself the rest of the estate; and a claim by custom or prescription to exclude him from all manner of profit is void, as unreasonable and against law (*Co. Litt.* 122 a).

In the case of *Potter v. Sir Henry North* (1 Vent. 383, quoted 1 Saund. 347), it was much discussed whether a prescription for a sole and several pasture, in exclusion of the lord of the soil

during the whole year, was good ; and although it was strongly argued against, as a new invention to exclude the lord from his own soil ("and the consequence of this invention will be great and general, for there is no common in England but this plea will serve for, if the jury will find it, and it is found from experience that many times, should the lord of the manor give good evidence, a jury will find against him"), and as a bar to all improvement on the part of the lord ("which would be a great mischief to this kingdom, where there are large wastes and commons, forests and fens, to take away all power of improving them, for the same land, by improvement, becomes able to support a great number of people, which are the strength of the kingdom"), the judges of K. B. were inclined to think the prescription might be supported ; and in *Austin v. Robins*, (1 Vent. 12, quoted 2 Saund. 323), it was adjudged that the prescription was good, as it did not take away all the profit of the land from the lord, "for his interest in trees, mines, bushes, &c., continued ;" and such a right of sole and several pasture, when in gross, and granted to a man and his heirs, is assignable, and does not necessarily descend to the heirs of the original proprietor (*Welcome v. Upton*, 6 M. and W. 540) [otherwise with an ordinary right of common in gross, which cannot be granted over (*per Treby, C. J., Weekly v. Wildman*, 1 Raym. 407)]. As to the soil of the waste itself, the commoner has no interest therein, except so far as his rights of common extend, and so it is said that he cannot resist an action of trespass by the lord for going on the common to put his cattle on, unless he *do* put his cattle there ; but otherwise, if he avers that he is going to look whether there is grass for the cattle to eat if put on it (*Spilman v. Hermitage*, 1 Roll's Abridgment, and 5 Vin. Abridgment 35) : and he cannot, in strictness, touch the soil, even though his interference would tend to ameliorate or improve the common, as by cutting down bushes, fern, &c. ; nor, except by custom, would he have the right to make a trench to avoid the water, even though the common were every year flooded with it (Bacon's Abridgment, p. 100). It is said, however, that he may amend and reform a thing abused, and if the land be full of molehills he may dig them down, and if the lord make a pond on the common, he may dig and let the water out ; but

this is not consistent with the case of *Sadgrove v. Kirby* (1 Bos. and Puller, 13), where it was held that trees, being the very fruit and produce of the soil, and part of the freehold itself, could not be removed by the commoner as a nuisance which destroyed the easement, but an action on the case should have been brought, if the planting of the trees diminished its enjoyment. And in *Cooper v. Marshall* (1 Burr. 259), *per* Lord Mansfield (by which the case just cited was governed), it was held, that a commoner had no right to fill up coney burrows, though they interfered with the common, but in such instance also the remedy would be by action, as the lord had a right to put coneys there, and the commoner had no interest in the soil.

The lord has a right for the most part to the mines and minerals, stones, gravel, sand, &c., in the waste, but how far he may use his right to the annoyance and disturbance of the commoners does not seem definitely fixed; it is apprehended, however, that he can do so only so far as custom warrants. (See the case of *Goe v. Cother*, 1 Siderfin, 106, quoted *infra*, p. 25.)

In *Bateson v. Green*, 5 T. R. 411, an action was brought against the lord for digging clay-pits on the common in such a way as to deprive the commoners of the enjoyment of the common; but as it was shown that the lord had always dug on the common, and taken what clay he pleased, and to any extent, without interruption, and no witness could show in what respect the right had been more exercised in late years than formerly, it was held that the action would not lie, on the ground that the commoners had clearly always understood that their right was subject to the enjoyment of the common by the lord. This case, which seems very strong, must, however, be modified by the remarks of Denman, C. J., in *Hilton v. Earl Granville* (5 Q. B. 729). There the defendant justified the destruction of the foundations of plaintiff's house (a freehold of the manor) by a right, as lessee of the lord of the manor, to dig for minerals under the land on which the house stood, upon giving compensation for the use of the surface, but without making compensation for damage caused to any house standing thereon. This defence Lord Denman held could not be maintained: "if *Bateson v.*

*Green* is to be taken to import that a lord, after granting rights of common, may help himself to any portion of the common land, to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. The two decisions in the notes to *Bateson v. Green* are much more cautiously worded, and in that of *Folkard v. Hemmett*, Lord Chief Justice De Grey expressed himself conformably to what we consider the true legal principle. 'The defendants justify under the usage,' he says, 'I will not call it a custom, because I look on it as a reserved right of the lord,' and assuredly whatever the lord can reasonably be supposed to have reserved out of his grant, the usage may adequately prove that he *did* reserve. But a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right to the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." And he quoted the case of *Wilkes v. Broadbent* (Willes, 360), in which a custom that where the lord of a manor has coal-mines lying under the freehold lands within and parcel of the manor, he may sink pits in those lands to get the coals, may lay the coals when got, and the earth and rubbish, &c., on the land near to such pits, such lands being customary tenements and parcel of the manor, there to remain and continue (not saying how long or for a convenient time), may lay and continue wood there for the necessary use of the pits, may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts there, at his will and pleasure, was held to be a bad custom, as being uncertain and unreasonable, as it might deprive the tenant of the whole benefit of the land, and it could not be presumed that the tenant at first would come into such an agreement.

So, on these principles, a claim to cut green turves by the lord of the manor, without limit, as he chose, for sale, could not be supported, as it would be destructive of the common and unreasonable, and it could not be presumed that any such right was reserved originally in the grants to the freeholders or copyholders, nor could it be cured by length of user, being rotten at its foundation. (See *Report*, 1865, qu. 854-862.) Much

less could a right be set up by the lord to turn a large track of common into a brick-field, to the annoyance of the manorial tenants and the destruction of their common. (See as to such conduct at Chobham, *Rep.* 1865, qu. 5864.)

II. TO WHAT EXTENT THERE EVER WAS A POWER ON THE PART OF THE LORD TO INCLOSE AND APPROPRIATE TO HIMSELF PART OR THE WHOLE OF THE COMMON LANDS.

We have seen from what has gone before that the lord, originally the sole proprietor, for valuable considerations of service or otherwise, so far admitted his tenants and strangers to participate with himself in the enjoyment of the waste that it became no longer the property of the owner of the soil alone, but belonged jointly to the lord and those persons who had thus acquired common over it; and the several and respective rights could not be trenched upon or prejudiced by either party. One of the privileges which the right of common of pasture gave was for the cattle to roam over *any* part of the common (*Farmer v. Hunt*, Yelv. 201), and similarly with respect to other common rights; the commoner might take his turbary, estovers, and the like over the whole common, and the lord was consequently unable to deal with any part of it, or to interfere with these rights.

Whether if he left sufficiency of common, the lord had, at Common Law, the right to inclose, or, as it was called, approve (improve), any part of the waste, was very much discussed in *Grant v. Gunner*, A.D. 1809 (1 Taun. 435), and it was held by Justice Lawrence, with the approval of Mansfield, C. J., "that at Common Law, perhaps the lord might inclose against common of pasture appendant, which was not an express grant but was exercised where the lord granted arable land to be held of himself; but it did not follow that he could approve against his own grant; and by such view the expressions of Lord Coke, seemingly contradictory, would be reconciled." Against common of turbary, which the same judges considered always to lie in grant, they concluded that neither by the Common Law nor by any statute could the lord approve. This conclusion was consistent with the expression used in the statute of Merton,

with which we shall hereafter have to deal: "it is provided and granted," not merely declared, and with the words in the recital in the statute of Westminster, 2nd, 13 Ed. I. c. 46, that "by the statute of Merton it was granted that lords might approve, notwithstanding the contradiction of their tenants, and *forasmuch as no mention was made between neighbour and neighbour*, many lords of wastes, &c. had been hindered." It would follow from this that these statutes first gave the right to approve, and only so far as they extend can the lord claim the right (*Grant v. Gunner*, 1 Taunt. 440). Compare also the case of *Goe v. Cother* (1 Sid. 106, 14 & 15 Charles II.): this was an action on the case brought by a commoner for digging pits and spreading gravel, whereby he had lost his common; the defendant pleaded that he was lord of the soil, and that he dug for coals, doing as little damage to the pasture as he could, and averred that he had left sufficient common. On demurrer the Court said that the lord could not dig pits on the common, into which perhaps the beasts of the commoner might fall, for the statute (of Merton) meant another kind of improvement, *viz.* by inclosure; and that before that statute the lord could not improve.

For the sake however of the public, and in order that, if there were more than a sufficiency of common, they might not be deprived of the advantages that might be made of the wastes, and the benefits which would arise from the increase of culture (*per* Ashurst, J., *Glover v. Lane*, 3 T. R. 447), the statutes of Merton and Westminster (the second) were passed.

The former statute (20 Henry III.), so called because it was made at a Court held at Merton in A.D. 1235, enacted (c. 4) as follows:—"As also because many great men in England (who have enfeoffed knights and those who hold of them in free tenure of small tenements in their great manors) have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, although the same feoffees have sufficient pasture, as much as belongeth to their tenements, '*it is provided and granted*' that whenever such feoffees do bring an 'assise of novel disseisin' for their common of pasture, and it is knowledged before the justices that they have as much pasture as sufficeth for their tenements, and that they

have free ingress and egress from their tenement into the pasture, then let them be contented therewith ; and they of whom it was complained shall go quit of as much as they have made their profit of their lands, wastes, woods, and pastures. And if they allege that they have not sufficient pasture, or sufficient ingress and egress according to their holdings, then let the truth be inquired by assise (or jury), and if it be found by the assise that the persons complained of have disturbed them at all of their ingress and egress, or that they have not sufficient pasture and sufficient ingress and egress (as before is said), then shall they recover their seisin by view of the jurors ; so that by their discretion and oath the plaintiffs shall have sufficient pasture, and sufficient ingress and egress, in form aforesaid ; and the disseisors shall be amerced and shall yield damages as was wont before this provision. And if it be certified by the assise that the plaintiffs have sufficient pasture, with ingress and egress, as before is said, let the other make their profit of the residue, and go quit of that assise."

Upon this statute Bracton, who wrote in the same reign, comments as follows :—"Now we must carefully consider how that statute is to be understood, lest a false understanding of it lead men to its abuse ; we must see whether he who is restrained by the act is a freeholder holding of the manor, or a stranger. If he is a stranger, the statute does not impose law on him, first because the easement he has may be by consent and agreement generally, which can be determined only by a contrary will and opposite agreement ; and secondly, because he was not 'enfeoffed' by the lord of the soil, so as to allow of his being restrained to a certain and definite number, according to the size of his tenement. And so in this case, if the lord of the soil and of the estate wishes to approve and inclose any part for himself, he cannot do it without the will and license of these persons ; and if he does, they will recover it by assize. If, however, the freeholders hold of a manor, then it makes a difference how they were enfeoffed ; for the statute does not restrain them all, nor absolutely ; and so we must see whether they have been enfeoffed generally, *i. e.* over the whole (common), and everywhere, and in all places, and for all kinds of animals, and without fixed number. If so, as common of this kind does not



belong to them from user, but by reason of the grant, the aforesaid statute does not bind such, because it does not take away a feoffment though it remove an abuse, and the voluntary consent of those who granted the easement and the common is very strongly to be taken into account. If, however, common were limited with a fixed and determined number of beasts, although the enjoyment may have extended by user more generally and largely than was necessary, such commoners are bound by the statute, so that they may be restrained into and within a certain spot: provided always the spot be sufficient and competent, with free and competent ingress and egress, so that it may not be troublesome or difficult; the spot ought to be competent, so that it may not be further off, but may be provided more close at hand. Again, in the same way, if a man has been so enfeoffed, without expressing the number or the kind of beasts, but with pasture such as belongs to such a tenement, in such a village, a feoffee of that description is bound by the statute, just as if the number or kind had been expressed, because where the tenement is fixed you can easily calculate the number and also the kind of the beasts, according to the custom of the locality. Again, whatever his user may have been, in the case either of a general or a limited feoffment, if he has used a competent spot (whether he can be restricted or not), he cannot be restricted, with loss and inconvenience to himself, to a place further distant, since distance brings inconvenience. And in the same way he cannot be restricted, unless he please, if the access be more difficult" (fol. 228).

This is in effect:—

1. That the statute does not apply to strangers who do not hold of the manor, and so would be inapplicable to rights of common in gross, or appurtenant to land outside the manor.
2. The statute does not apply where the right of common is *sans nombre* and over the whole common.
3. In fact, it only applies to freeholders of the manor where the right is limited, either expressly in number and kind, or impliedly by reference to the custom of the tenement, and then can only be exercised if the convenience of the commoner is fully attended to.

By the 13 Ed. I. st. 1, known as the statute of Westminster, the second, because made at a Court held there A.D. 1285, it was enacted (c. 46) as follows:—"Whereas in a statute made at Merton it was granted that lords of wastes, woods, and pastures might approve the said wastes, woods, and pastures, notwithstanding the contradiction of their tenants, so that the tenants had sufficient pasture to their tenements, with free ingress and regress to the same, and forasmuch as *no mention was made between neighbours and neighbours*, many lords of wastes, woods, and pastures have been hindered heretofore by the contradiction of neighbours having sufficient pasture, and because outside tenants (*forinesci tenentes*) have no more right to common in the wastes, woods, or pastures of any lord than the lord's own tenants: It is ordained that the statute of Merton, which made provision between the lord and his tenants, shall from henceforth hold place between lords of wastes, woods, and pastures, and their neighbours; so that saving sufficient pasture to their tenants or neighbours, the lords of such wastes, woods, and pastures may make approvement of the residue; and this shall be observed for such as claim pasture as belonging to (*pertinentem ad*) their tenements: but if any do claim common by special feoffment or grant for a certain number of beasts or otherwise than he ought to have of common right (*vel alio modo quam de jure communi habere deberet*), since covenant barreth the law, he shall have such recovery as he ought to have had by form of the grant made unto him. By occasion of a windmill, sheepcote, dairy, enlarging of a court necessary or courtelage, from henceforth no man shall be grieved by assize of novel disseizin for common of pasture."

This statute enlarged the statute of Merton, inasmuch as it extended it to strangers living out of the manor, in adjoining towns, and so made it applicable to rights of common appurtenant to land outside the manor, but special grants or feoffments are excepted, so that it would seem not to cover rights of common in gross; and, further, the other conditions mentioned by Bracton would still remain in force. It was decided, however, in a case in Leonard (anon. 4 Leon. c. 41) that a right appurtenant, by prescription, for common of pasture *sans nombre* would not prevent inclosure against it, as a calculation might be

made of the outside number which would be required for the tenement.

The erections which the lord is, by this statute, authorised to make, are put only as instances; so that he would be justified in erecting a house necessary for the habitation of beast-keepers, for the care of the cattle of himself and the other persons having rights of common there; so he may erect a house necessary for the habitation of a woodward, to protect the woods and underwoods on the common (*Patrick v. Stalls*, 9 M. and W. 830), and even though there be not sufficient common left; but whatever building is erected must be for the lord's own habitation, or of his shepherd (*Nevill v. Hamerton*, 1 Lev. 62.); and the statute would not justify the lord in erecting a brick-kiln, as has been done by the lord of the manor on the common at Chobham. (*Rep.* 1865, qu. 5864.)

Neither of these statutes at all affects the right of common of piscary, estover, turbary, or similar rights, as they are confined exclusively to common of pasture (*Fawcett v. Strickland*, per Willes, C. J., adopted by Lord Kemson in *Shakespear v. Peppin*, 6 T. R. 741); but the existence of such other rights will not prevent the lord availing himself of the powers of the statutes to inclose as to the common of pasture; though if by such inclosure, says Willes, C. J., the common of piscary or the common of estovers were affected, or the commoners were interrupted in the enjoyment of either of their rights, they might certainly bring their action, and "the lord (to be sure) in such case could not justify such inclosure in prejudice of these rights." (Cf. *Glover v. Lane*, 3 T. R. 447).

We have seen that the right of common of turbary, over the whole common, may be proved by user over a part (*Peardon v. Underhill*, 16 Q. B. 120); but it is established also by that case, that the right will not be extended to those parts of the common which are not, and never could have been, available for or conducive to the enjoyment of the right, so as to interfere with the lord's inclosure against common of pasture.

Copyholders are not within the statutes (per Littledale, J., *Arlett v. Ellis*, 7 B. & C. 375).

The result then as to the powers of the lord in the absence of custom is this:—

(i.) The onus of proving that sufficient pasturage is left for all persons having rights of common of pasture, and with the same convenience for enjoyment as before inclosure, lies upon the lord (*per* Bayley, J., *Arlett v. Ellis*, 7 B. & C. 370).

(ii.) If there is any person who has rights of common of pasture in gross (*Farmer v. Hunt*, Yelv. 201), which would seem to be the exception mentioned in the statute of Westminster, the inclosure cannot be made at all.

(iii.) If there is any person who has rights of common of piscary, turbary, or estovers, or such like, any inclosure must be subject to such rights, and must not in the least infringe upon them, either by diminishing the quantity or rendering it less accessible; and similarly with regard to the forest rights of the Crown, so that no part of a common could be inclosed which is the subject of such rights, or necessary to their full enjoyment.

(iv.) Copyholders cannot be prejudiced.

This is independently of custom; but in some manors there are customs by which the lord is enabled to act beyond what the statutory powers would allow, but the validity of every such custom is liable to be scrutinised by the law.

In *Clarkson v. Woodham*, 5 T. R. 412, as explained by Bayley, J., in *Arlett v. Ellis*, 7 B. & C. 367, a custom was held good *not* to withdraw from the commoners any part of the pasture or turf-land, but that the owner should assign to particular individuals, who had right of turbary over the whole common, a particular portion of moss-land, and that they should work upon it, and not elsewhere, until all the turbary should be exhausted, and then that the owner might inclose. The owner did not take away from the commoners anything which had been originally appropriated to them for the purposes of pasture or turbary.

But a custom claimed by the lord to inclose common without limit, without regard to the commoners, is void; as it would go to the destruction of the commoners altogether. (*Arlett v. Ellis*, *ut sup.*, following *Badger v. Ford*, 3 B. & Ald. 153.)

A custom again is sometimes set up of granting, with the consent of the homage, parcels of the waste to be held in severalty by copy of Court Roll, and inclosed in exclusion of

persons having rights of common: and *Folkard v. Hemmett*, 5 T. R. 417, decided that such a custom was good, for "being," Bayley, J., says (*Arlett v. Ellis*), "tenants themselves, it is not very likely that they will lean unfairly towards the lord. If the homage say, therefore, that a grant shall be made (assuming that the lord has a right to grant, wherever there is more land than is necessary for the purpose of the commoners), it may be reasonably presumed that the homage have given their consent to the grant only when it is clear that the land granted may be taken by the grantor, without interfering with the rights of the commoners." And a similar custom would be good, notwithstanding that the Crown had forest rights over the waste, if the Crown rights were not prejudiced (*Boulcott v. Winnill*, 2 Camp. 260).

We have seen however, that "homage" is a word properly applicable to the Court Baron, and the freeholders in it, and is only by analogy used with reference to a customary court and the copyholders; and that the two courts, and the persons representing them, are perfectly distinct. In order, therefore, that the consent of the homage should bind freeholders and copyholders, it must be the homage of both classes, and must not be composed exclusively either of one or the other. [Cf. the custom as stated with reference to the manor of Wimbledon, in *Watkins on Copyholds*, and *Manning and Bray's 'History of Surrey,'* (Rep. 1665, qu. 1664) "The lord has liberty to grant, &c., with consent of the *free and customary* tenants."]

There are in various manors different customs by which certain persons are selected to represent the whole body, but in every instance the custom would have to be strictly followed: "For although," says Coke (5 Rep. 63 a, *Chamberlain of London's Case*) "the inhabitants of a town, without a custom, may make ordinances or by-laws for the repair of a church, or a highway, or of any such thing as is for the general good of the public, and in such case the greater part shall bind the whole, without any custom; but if it be for their own private profit, as for the well ordering of their common of pasture, or the like, then without a custom they cannot make by-laws; and if there be a custom, then the greater part shall not bind the less, if it be not warranted by the custom. For as custom creates them (the ordinances), so they ought to be warranted by the custom."

This smaller body, selected to represent the whole homage, would, it is apprehended, upon the principles just enunciated, have to be unanimous, except in case of an express custom to the contrary, which in most manors does not exist, as it seems necessary that all persons thus chosen to represent the homage should sign the Minute Books of Proceedings, to testify their concurrence in the resolutions (*Rep.* 1865, qu. 976-3177).

Further, as upon principle the consent of the homage is only of force in so far as it is decisive evidence that the inclosure proposed by the lord will be of no damage to the commoners; if the decision is unfairly gained, or the homage in giving it act not as the representatives of the commoners, but as mere instruments in the hands of the lord, their consent would go for nothing. Consequently a custom would be bad by which the lord was able to pack the homage with his own nominees—persons, it might be, picked out for the express purpose of seconding the views of the lord, instead of performing their duty of protecting the interests of the commoners. The consent must be honest and unbiassed, so as fairly to represent the feelings of the commoners, and a claim on the part of the lord of a right, after an adverse decision of the homage to exhaust the whole body of tenants, until he found a certain number willing to assent to his views, would be as opposed to law as it is, we believe, unknown in practice (*Rep.* 1865, qu. 3205).

The validity of a custom for the lord of the manor, with the consent of the homage, to grant common, or waste lands, to be holden of the lord by copy of Court Roll, is recognised in "The Copyhold Act, 1841," (4 and 5 Vic. c. 35, s. 91); but it is provided that nothing in that Act should operate to authorise or empower the lord to grant any such common, or waste lands, without the consent of the homage assembled at a customary court holden for such manor; nor should any court holden for such manor be deemed or taken to be a good or sufficient customary court for such purpose, unless the same should have been duly summoned, and holden, according to the custom of such manor in such cases used and accustomed before the passing of that Act; and unless there should be present at such court a sufficient number of persons holding lands of such manor by copy of Court Roll, to constitute, according to such custom, a

homage assembled at such court: and here the distinction seems to be properly maintained between the homage of the manor and the homage assembled at the customary court, which would be merely one division of the whole, and to which the provision of the section alone applies.

Lastly, we may observe that the value of such a custom as this could never have been, even in ordinary times, of much value to the lord in assisting his powers of inclosure; as the homage would not care to give their consent very freely, as the effect of it would necessarily be to abridge their own rights, and the benefit which would accrue from the inclosure would all go to the lord.

From what has been said we may fairly conclude that, leaving out of consideration the changes in the rights of the several parties, due, as it is alleged, to changing times and circumstances, and to the effect of recent legislation (with which we shall presently deal), the powers which the lord might legally exercise in inclosing the waste were so small as to be practically valueless; for, except so far as his statutory or customary powers aided him (and how little that was we have already considered), the lord would be obliged to get the consent of *all* the commoners to a proposed inclosure, a condition so severe, from the large numbers and the probable disability of many, as to amount almost to an impossibility.

There are indeed old cases, in which the Court of Chancery seems to have interfered for the benefit of a lord, to coerce commoners who made, as the court thought, unreasonable opposition to approvement by the lord: "one or two should not stand in the way of the general good" (Tothill, 175); but such cases could never have availed the lord much (and less still in the present day, when courts would not hold that the inclosures of large commons in the neighbourhood of cities is a public good), for the principle which these old cases seemed to have recognised was very soon abandoned as too broad, the cases themselves being explained as, in reality, founded on agreements previously entered into; and the absence of agreement, and the fact that the opposing party was not bound by such, was considered sufficient to defeat the application for inclosures; as in the case of *Capella de new Elmes v. Erbury* (Tothill, 175), a demurrer

was overruled where a parson would not answer, nor be compelled to inclose, though it were for the common good; and in *Ingram v. Wells* (Tothill, 175), "the court would not bind a man to an inclosure who never assented." Again, in the case of *Delaberre v. Beddingfield* (2 Vern. 103), which was on a bill for specific performance of an agreement to stint, it is said that "there is a great difference between an agreement for an inclosure and an agreement only for a stint of common. It is a proper and natural equity to have a stint decreed, and though one or two humoursome tenants should stand, and will not agree, yet the court will decree it; but it is otherwise as to an inclosure."

And we may further add that the remedies which the commoners had were fully adequate to restrict any transgression by the lord of his just rights; they were not confined, in case of inclosure by the lord, to an action on the case, and to such pecuniary damages as a jury might think they had actually sustained, but they had a right to be restored to the enjoyment of the common itself.

The remedy referred to in the statute of Merton as "assise of novel disseisin," has become obsolete, but only because the same relief can now be obtained by writ of ejectment. "Disseisin is the putting out of possession by wrong; assize is nothing but a sitting, and in this special connection means a sitting of the justices to inquire into a case of wrongful disturbance of possession. It was called assize of novel (new) disseisin, because the justices of eire (*i.e.* the journeying, circuit-going justices) before whom these assizes were taken in their proper counties, did ride their circuits from seven years to seven years, and no disseisin before the eire, if it were not complained of in the eire, could afterwards be questioned; and therefore a disseisin committed before the last eire was called an ancient disseisin, and a disseisin after the last eire was called a novel (new) disseisin." (Assize is used in the latter part of the statute for jury). Under a writ of this nature a man would recover the land from which he had been disseised, and in the case we are now considering the land with its common, together with full damages for the disseisin (Bracton, 187); and it was held (Hob. 43) that "though a wood be stubbed up, so that there neither is nor will be any



wood again, yet a man who had common of estovers in the woods should have an assize from year to year of his common of estovers, and he shall recover a seisin of these estovers, which are not in being, whereof he is supposed to have been disseised, and also damages; not according to that it now yields, but according to the value which it yielded in common years, though it be uncertain."

Similar remedies, as we have said, would now be the right of the commoner under a writ of ejectment, and it is apprehended that it would be quite consistent with the practice and principles of the Court of Chancery to restrain, by injunction, such acts of the lord as would necessitate the bringing of constant actions, year by year, on the part of the person entitled to rights of common; as, in the first place, it would be an injury to the land, which is in general considered by the court not possible to be estimated in damages; and further, it would be a positive right in the commoner to refuse to have it estimated in damages once for all; the wrongful act of the lord (as decided in *Hob. 43*) not availing to deprive him of his inheritance; besides that as the lord would have a right to ask the aid of the court in acting according to his powers under the statute of Merton (*Weeks v. Staker*, 2 Vern. 301), and the remedies must be mutual (by the first principles of equity), the commoner could likewise resort to the same jurisdiction. A copyholder may have an action on the case in similar circumstances, and it seems probable that even at his instigation the Court of Chancery would act to restrain the wrong doing of the lord, by which the whole benefit of the common would be taken from a copyholder; although in respect of acts which the lord has a right to do, such as planting trees and putting in rabbits, the commoner would succeed only in an action on the case, and would recover such damages only as would compensate the loss really sustained.

We find that in *Trigg v. Payte* (quoted Tothill, 175), a decree was made to overthrow inclosures, "if the defendant would not recompense the petitioner so much as he had been prejudiced by the inclosure being a depopulation, although a remedy at law upon the statute."

This case is exceedingly important, as showing that the Court

of Chancery has jurisdiction to recognise the rights of the commoners, not only as they are available for the exact purposes in respect of which they originated, but also as from surrounding circumstances, or collateral events, they have acquired an additional and adventitious value.

There is also another remedy, which has been much resorted to lately to assert the rights of commoners against the claims of the lord; by which the commoner takes the law into his own hands, and abates a disturbance of his rights. How far this right extends is discussed by Lord Mansfield in *Cooper v. Marshall*, in relation to the conies and the coney burrows: "The lord by his grant of common gives everything incident to the enjoyment of it (as ingress, egress, &c.), and thereby authorizes the commoner to remove every obstruction to his cattle grazing the grass which grows upon such a spot of ground, because every such obstruction is directly contrary to the terms of the grant. A hedge, gate, or wall, to keep the commoner's cattle out, is inconsistent with a grant which gives him a right to come in. The grant gave him leave to enter, and put in his beasts, therefore it virtually authorized him to remove any obstruction directly repugnant to that liberty" (1 *Burr.* 259).

If, however, the nuisance (*nocumentum*) be, as Bracton says (lib. iv. c. 37), a *nocumentum justum*, something just in itself, and injurious merely from its excess (as trees planted and conies), such cannot be abated; but anything which is a *nocumentum injuriosum* in itself, from its very commencement unlawful, the commoner may abate, and abate wholly, and he is not confined to such measure of redress as might perhaps serve his convenience for the time (*Arlett v. Ellis*, 7 B. and C. 346.) If, however, the disturbance to the right of common has been allowed for twenty years, the commoner should proceed at law, and not abate (*Creach v. Wilmot*, per Lee, C. J., cited in *Hawke v. Bacon*, 2 Taunt. 160); and it was held in Chancery that a common which had been inclosed for thirty years should not afterwards be thrown open (*Silway v. Crompton*, 2 Vern. 32).

III. Let us now examine whether the powers on the part of the lord of inclosing and appropriating to himself a part or the

whole of the common lands, have been increased (as it is alleged), in the course of years, by changing times and circumstances.

1. Have the rights of commoners been lost by non-user?

Various causes have been at work in late years to diminish the value of the rights of common in their original form, in respect of open spaces in the neighbourhood of the metropolis and other large towns; the adjoining land becomes built upon, and the number of cattle required to be kept for purposes of agriculture or food is decreased, as the supplies are obtained from a greater distance. Experience shows that turning out animals on the open common is prejudicial to their health and condition; the cheapness of coal (except where, as at Godalming in Surrey, from its inland position numerous tolls become payable, *Report*, 1844, qu. 830) makes the turves hardly worth digging, and altogether, from the general advance of civilization, the tenants find readier and more regular supplies elsewhere than the precarious gifts of the common afford. But it is apprehended that the non-user of the rights does not extinguish them. It is said in the books (Britton, 144) that as the rights of common may be purchased by long sufferance, so they may be lost by long neglect; but Mr. Justice Littledale, in *Moore v. Rawson* (3 B. and C. 339) says that the same length of time that would be necessary in such a case to raise a presumption of grant, would be necessary in case of disuser to raise a presumption of release; and further, as perhaps the principal cause of non-user has been a willingness that the public may more fully enjoy their recreation over the whole common, the presumption would be that only so far as was for the benefit of the public the rights had been allowed to fall into disuse, and that the intention was that they should be strictly retained, if such retention was necessary to secure the public benefit (see *Ward v. Ward*, 21 L. J. Ex. 334).

We may add here a very recent decision in the Exchequer Chamber, Feb. 1866, in the case of *Carr v. Lambert* (1 L. R. Ex. 168), which decided that a right of common appurtenant for cattle *levant and couchant*, proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but now, and for more than thirty years past, turned to different purposes, is not extinguished or

suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purpose of feeding cattle.

2. In the manor of Wimbledon the lord contends (*Report*, 1865, qu. 724) that there are no copyholders who are entitled to common rights, because the custom, as stated in the Parliamentary Survey, 1649 (*Rep.* qu. 1666), is in this form :—" Every cottager, who is a copyholder of the s<sup>d</sup>. Manor, may keep on the commons within the s<sup>d</sup>. Manor 25 sheep, 2 cows, 1 mare, 1 coult, and to have once in every year allowed him one cart-load of crop wood from off the pollards of the s<sup>d</sup>. common ; and he that hath 15 acres or the greater part of 15 acres of copyhold land, is to have the like liberty of commoning and firebote." There are some 250 copyholders, many of them cottagers, but it is said that it is necessary that the cottage and land should have been standing and inclosed in the reign of Richard I., and there is now no longer such cottage, nor any one holding fifteen acres or the greater part of fifteen acres of land, which was inclosed in such ancient times : " Custom extendeth not to things new." Upon this contention we may observe (A), that according to the principle which we have already considered with regard to common of turbary, the right would remain attached to the the land on which the cottage stood, so as to belong to a cottage on that ground, even though the ancient cottage had been destroyed ; and this principle is expressly recognised in the Inclosure Act, 1845, sec. 53, where it is enacted, " that all tofts, foundations, or sites of ancient commonable messuages or cottages shall, upon proof that commonable messuages or cottages stood thereon, be deemed commonable messuages or cottages, and the respective proprietors shall be entitled to compensation for the rights of common originally belonging thereto, as if such messuages or cottages were still standing."

(B.) The right of common would attach to the ancient inclosed land, even though it were broken up into smaller holdings, and the right of common would be apportionable accordingly.

Apportionment may be necessary, either from a change in the estate which has the right of common, or from a change in the estate which is subject to such right, *i.e.* from a division of

the dominant tenement into several holdings, or the release of part of the servient tenement from the servitude. There is this distinction in the two cases: in the former, whether the right be appendant or appurtenant, it will be apportioned; in the latter, it will be apportioned if appendant, not if appurtenant. In the former case "because, if the law were otherwise, all common appurtenant would be destroyed (which would be against the commonwealth), for no land continues in so entire a manner, every acre together with another, as it was *ab initio*; but for preferment of younger sons, advancement of daughters, payment of debts, or other causes, part has been severed (*Wyat Wild's Case*, 8 Co. 78 b, explaining *Tyrringham's Case*); and the case of commons is not so strict an entirety as warranty, conditions, and such like, which cannot be divided by the act of the parties (Hob. 235); and the mischief of the generality of the case requires an extension for the public good."

In the latter of the two classes of apportionment, where, for instance, as in *Tyrringham's Case*, the estate which had the right of common was in the hands of the owner of part of the land over which the right of common extended, it makes a difference whether the right be appendant or appurtenant. If appendant, as that is necessarily incident to the land, the common is apportioned; but if appurtenant, "as that is against (*i. e.* not of) the common right, it cannot be extinct in part, and be *in esse* for part, by the act of the parties" (*Tyrringham's Case*, 4 Co. 38 a.)

But as the former is the case of apportionment with which we have to deal, it matters not whether we consider that the interest which custom gives to the estate of a copyholder enables him to claim common as it were appendant or appurtenant to his tenement,—the right of common which belongs to it will be apportioned.

(C.) It seems probable that a considerable number of the 290 copyholders who now hold of the manor have received their tenements in recent times, according to an immemorial custom, which is said to exist in the manor, that a lord may, with the consent of the homage, inclose the waste (*Rep. qu.* 760), and which probably means that the grantees shall hold by copy of Court Roll. If this is so, having been granted by virtue of "an

immemorial custom to demise parcels of the waste as copyhold, they are to be considered as much copyhold tenants as if they had been immemorially holders by copy of Court Roll" (*Lord Northwick v. Stanway*, 3 Bos. & Pul. 347); and the cottages built upon the newly granted copyholds would be ancient cottages, and the copyholders entitled to the benefit of the custom accordingly.

3. The number of copyholders in the manor of Hampstead has been greatly reduced by enfranchisement, forty having been enfranchised since 1853, and the lord claims that he can at his pleasure extinguish them altogether, for the Copyhold Act, 1852, gives him the power of compelling the copyholders to be enfranchised, and they then lose all right of common, unless it is specially conferred by a re-grant, which the copyholders would have no right to demand (*Rep.* 1865, qs. 2299-3216). This claim, which looks so serious, is totally void of foundation. It is true that upon enfranchisement of copyholds the right of common is at Common Law extinguished, just as in the case of *Brabant v. Wilson*, 1 L. R., Q. B. 44 (1866), it was decided that restrictions against building, to which the copyhold was subject, were removed by enfranchisement, but the right of common still *remains in equity*; and in the case of *Styant v. Staker* (2 Vern. 250, Eq. Cas. Abr. 104), which was really based upon the broad principle and has never been varied, it was decreed that the copyholder should, after enfranchisement, have the same right of common as previously belonged to his copyhold. But further, this usurpation and intended abuse of the powers given by the Legislature is defeated on its own ground; for by the Copyhold Act, 1852 (15 & 16 Vic. c. 51, s. 45), which gave power either to the tenant or the landlord to compel enfranchisement, it is enacted that nothing therein contained should operate to deprive any tenant of any commonable right to which he might be entitled in respect of such lands, but such right should continue attached thereto, notwithstanding the same should have become freehold. And a like provision was in the Copyhold Act, 1841.

For the rest, taking the rights of persons having common over the wastes of the several manors in the metropolitan area, as shown by the evidence before the Committee of the House of

Commons in 1865, we may conclude that, if acted on, they would be fully sufficient to restrain the lords from their threatened inclosures; and the mere fact of encroachments having been ventured on by the lords cannot be taken as any good evidence of their legal power, when we find that they will claim to take advantage of an Act of Parliament for compulsory enfranchisement, and ignore the provisions which have anticipated and guarded against the abuse which they intend to perpetrate.

Lastly, we may add, that in the recent case of *Carr v. Lambert* (1 L. R. Ex. 170) above cited, the Court seemed not indisposed to listen to arguments to show that the expression *levancy and couchancy* was a mere measure of the capacity of land to keep cattle out of the artificial or natural produce grown within its limits, and that the restriction implied therein would be complied with, although the estate, according to its existing condition, could not in fact produce such food. If this were so (although we think it would be scarcely consistent with the authorities upon the subject we have before adduced), the rights of the commoners would be very much greater than they are generally supposed to be, for the artificial food upon which beasts are now fed, although in fact purchased elsewhere, could in theory be grown and manufactured on the spot, and a very much smaller space of ground would suffice to maintain a number of animals, than if they were confined to the simple old-fashioned diet. And further, so far as the lord bases his right of inclosing and building upon the custom, he is now in a more hopeless position than he ever was; for the veto lies with the homage, and in the present state of local feeling in respect of the diminution of the commons, it would be absolutely impossible to get from them a fair and binding consent, as such would amount to a verdict that the inclosures proposed were not prejudicial to the commoners, which would be notoriously untrue.

The 5th and 6th William IV. c. 50, amended and explained by subsequent Acts, gave (sec. 51) power to the Surveyor of Highways to dig for and carry away gravel, sand, stone, and other materials for repairing roads, from any waste land or common ground, river, or brook within the parish for which he is surveyor; but such enactments, it is apprehended, would not limit or interfere with the powers of inclosure, whatever those

might be, as they would be applicable to what was waste for the time being; and the lands, when inclosed, could only be interfered with in case there were not sufficient waste (sec. 54) left, and then only in the same way as other private and inclosed lands.

IV.—HAVE *the Public*, BY THE ENJOYMENT OF THE PRIVILEGES WE ADVERTED TO AT THE OUTSET, ACQUIRED ANY RIGHT TO PREVENT THE COMMONS BEING INCLOSED AND BUILT UPON?

The following facts we may take from the Report, 1865, of the Committee upon Open Spaces (Metropolis), as proved, or capable of proof.

1. That the public have from time immemorial enjoyed the privilege of using the common lands freely for exercise and recreation (see *Rep.* 1865, *passim*; and particularly the statement that 50,000 persons, on Easter Sunday in 1865, came to Hampstead Heath from all parts of the Metropolis).

2. That such enjoyment has been entirely free from interruption on the part of the lords.

(a.) They have interfered with no one personally for strolling over the ground (*Rep.* qs. 929, 3071), although for the smallest interference with the soil they have acted with the greatest strictness.

(β.) They have put up no notice boards to warn off the public, although notices against rubbish and nuisances have been generally employed (*Rep.* qu. 952, &c.)

(γ.) They have not moved, even when the enjoyment has been more than usually exercised, and in a demonstrative and palpable manner, as in reviews of the militia (*Rep.* qu. 2184), drill of volunteers, or the Epping Forest hunt (cf. also qu. 3191, &c.)

The question then is, whether from this immemorial, continuous, demonstrative, and uninterrupted user, the public have acquired a legal right to have it always continued to them?

Now, in approaching the consideration of the rights of the public in respect of such user over these common and waste lands, we are met at the outset by a dictum of Abbott, C. J., in *Blundell v. Catterall* (5 B. and Ald. 315), which seems directly to



negative any such right. "Further, the practice (that of going on to a certain spot for the purpose of bathing), as far at least as I am acquainted with it, differs in degree only, and not in kind or quality, from that which prevails as to some inland wastes and commons, and even the difference in degree is not in some instances very great. Many of those persons who reside in the vicinity of wastes and commons, walk or ride on horseback in all directions over them for their health and recreation, and sometimes even in carriages deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering-places this practice prevails to a very great extent, yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil."

But *Blundell v. Catterall* was a case in which the question was of Common Law right, independently of user. The action was brought by the owner of the sea-shore against the proprietor of an hotel recently erected, who had placed bathing-machines on the shore and let them out for hire to the bathers. Until the erection of the hotel, bathing-machines had never been used. The defendant contended for a Common Law right for all the king's subjects to bathe upon the sea-shore, and to pass over it for that purpose on foot, and with horses and carriages. The Court held that there was no such Common Law right; but the question whether by long user such public right could not be acquired was not decided, and, indeed, was not discussed. Mr. J. Holroyd compared the case to that of the right by the public of towing on the banks of ancient navigable rivers, which it had been decided (*Ball v. Herbert*, 3 T. R. 253) could not be claimed of common right; but, in that case, Lord Kenyon uses these words, "The right is not claimed on one side or the other as is most convenient, but on both sides of the river; but that is contrary to common experience, for, if we look at any of the great public rivers, we shall find that it is not so used, although it would be highly convenient to the persons using the navigation. On the contrary, the navigators are obliged at several places to pass from one side of the Thames to the other with great inconvenience and delay; that is the

case by the Duke of Montague's gardens between Richmond and Kew, and in various other parts. Such is the right on that river, the quantum of which is ascertained by usage. That there is such a custom on most of the navigable rivers no person doubts, but still the right is founded solely on the custom, but here the claim is set up without any custom at all." And again : "Perhaps small evidence of usage before a jury would establish a right by custom on the ground of public convenience."

And as to the special right of bathing on the sea-shore, the Court of Common Pleas, in a recent case (*Mace v. Philcox*, 33 L. J. 124), seemed to intimate that usage might give to the public a right of bathing on a particular spot. "I do not express any opinion," says Mr. J. Williams, "whether the public had a right before the statutes (upon which the case turned) to use the *locus in quo* for the purpose of bathing in the sea ; but I give my judgment on the ground that there is nothing in these statutes which can be construed to subject this part of the sea-shore to the further servitude of having bathing-machines placed on it for the purpose of such bathing."

So with regard to the enjoyment by the public of exercise and recreation over the common. It is not contended that, independently of user, there is any Common Law right—simply upon immemorial usage it is claimed ; and, from that point of view, the dictum of Abbott, C. J., may, it is thought, be disregarded, and we may proceed to the consideration of the question so far untrammelled.

In the case of *Dyce v. Lady James Hay*, decided in the Court of Session in Scotland (2nd series, 1266), and carried to the House of Lords (1 Macqueen, 305), a claim was made to the servitude of using for purposes of recreation a piece of ground lying between a public footpath running through inclosed grounds forming part of the estate of Seaton, the property of Lady James Hay, and the River Don. The summons asserted that the piece of ground had been from time immemorial resorted to by the inhabitants of New Aberdeen, Old Aberdeen, and the vicinity thereof, for the purpose of recreation, and taking air and exercise, and walking over and through the same, and resting thereon as they saw proper, and concluded to have it declared that the piece of ground was open to the per-

sons aforesaid, and that they were entitled at all times to enjoy and recreate themselves therein without limit or hindrance from the defendant, for the convenience, comfort, and health of the persons aforesaid, their families and dependants. It was decided in the Court of Session (Adv. Lord Cockburn), and also in the House of Lords, that the claim could not be allowed; "it was in the nature of an easement so large as to preclude the ordinary uses of the property by the owner of the lands affected, and such a right could not be gained by prescription." "A right such as here claimed over private inclosed grounds, not made for the public but for private parties, and having no written title connected with the grounds, and merely walking over them and resting on them at their pleasure, is a thing of which I believe there has hitherto been no example, and the injury to the proprietors in such a thing when asserted as of right must be apparent." (*Per* Lord Moncrieff, p. 1281.)

But note the observations which are made by the judges:—"The summons originally added," says Lord Justice Clerk, "the words 'by the public generally.' This was not repeated in the draft of the issue reported to us. In my apprehension the omission is wholly immaterial, so far as the interest of the defenders is concerned, or, indeed, as respects the legal principles by which the case is to be decided; for really I do not understand, whether we regard the extent of resort to such a place, or the amount of the burden to which the pursuer proposes to subject the property of the defenders, what the public in that quarter could mean or include beyond the inhabitants of Aberdeen and Old Aberdeen and the vicinity. I look on the claim as one embracing the whole public, as widely as if it had stood on the summons and issue; but, in point of law, the omission, in my opinion, does not improve, but injures the pursuer's case, for the case would have been more tenable if it had claimed for the public, and if it could have been supported by any allegations as to the character of the ground as having been devoted and surrendered to the use of the public. Now I beg at once to say that I wholly reserve my opinion as to such a claim if the pursuer had been able satisfactorily to aver that, from time immemorial, there had been in the neighbourhood of a large burgh a piece of open vacant ground lying on

the sea-shore, or even along a river, which the proprietor had never occupied in any proper sense, but devoted and set apart with his presumed consent for the use of the inhabitants, such as could be averred as to several links in the neighbourhood of some towns, or as to the piece of ground near Arbroath, respecting which very pointed averments as to long-continued dedication to the use of the public were made; but one of the most remarkable circumstances in this case is, that the pursuer avoids any account whatever of the history of this ground. It is not stated to whom it originally belonged, whether at any time connected with either burgh, nor that this piece of ground has ever been so used for any public purpose, or game, or meeting" [such, for example, as reviews on Hampstead Heath, or the hunt in Epping Forest], "or other use, so as to imply even on such occasions the assertion and exercise of any right. It is not averred directly that it was appropriated or given over to the use of this district for the inhabitants of these places, and no such conclusion can be inferred from any expression in the summons. I must also allude to the broad, important, and most discriminating distinction between the cases of burdens or servitudes attempted to be enforced on proprietors, between whom and the claimant there is no connection whatever (either as to the relative rights of superior and vassal, or of baron and inhabitants of any burgh of barony, or of corporation and burghers), and the cases in which the inhabitants of burgh of barony are maintaining certain privileges or rights as flowing from or part of the grant in the erection of a burgh of barony; where the burgesses or community of a burgh are contending that certain property belonging to the corporation is held merely for the purpose of the public use of the whole community; or in which the vassals over large feuing grounds are contending that the common superior had truly devoted part of his ground, or wells, or water adjoining, for the benefit of those taking feus from him, so that such privilege came to be a pertinent or adjunct of the feu, or a part of a plan on which they relied in taking their feus." And Lord Moncrieff says, "*A servitus spatianti* over open ground which has in some manner been devoted to the public use is intelligible and known to the law." Lord St. Leonards also, in the House of Lords, takes especial

care to distinguish the case from a right to which he says the case had been improperly assimilated—the right of village greens and village playgrounds, the enjoyment of which has been dedicated to the public. “One of the learned counsel for the appellant seemed to argue,” says the Lord Chancellor, “that there could be no such dedication by the Law of Scotland. I pressed him again upon it, and *it is now admitted to be clear that the Law of Scotland in that respect agrees with the Law of England.* If there be a piece of ground uninclosed (not that I mean to say inclosure would make any difference unless there was an exercise of adverse right), but I say, if there be a piece of ground uninclosed, and dedicated from time immemorial to the public, from which a custom may be laid for sports generally or any village recreation, nobody, I trust, will suppose that such rights can at all be affected or disturbed by any decision at which your lordships may arrive upon the present appeal. These rights will remain untouched, and are unassailable, be the fate of this case what it may. My lords, there are a good many other cases which I think we should likewise take care to except. Some of the most important of them are corporation cases, where the inhabitants of towns claim rights against the corporation, that corporation being, in fact, trustees for the inhabitants, and the claim arising not between the corporation and the public, but between the governing body of a corporate place and the bulk of its own population. Such cases have and can have no bearing on the present.”

The result, then, of this case seems to be, that “there is nothing absurd, or publicly hurtful, impossible, or extravagant” (to use the words of Lord Cockburn) “in the idea of a proprietor acquiescing in his land being restrained for *that profit or pleasure of another which consists in the latter having the recreation of walking over it, and that he may lawfully dedicate it for that purpose;*” but in the absence of any suggestion of such dedication, and when the surrounding circumstances make it almost inconceivable that such dedication should ever have been intended, the mere fact of persons having been allowed without opposition to exceed their rights, and trespass on the ground, would not raise a custom to supersede or limit the rights of an original proprietor, when the effect of it would be to deprive

him of the whole enjoyment and profit of the land. Lord St. Leonards must not be taken to have intended to have meant, in the passage quoted, that the fact of the ground in question being inclosed ground went for nothing in the case (as suggested in *Rep.* 1865 qu. 35), but he says rather that the fact of a village green which had been dedicated to the public having been inclosed, if it had been inclosed without exercise of a right hostile to the dedication, would not affect the right of the public. There could be no question but that the fact that the spot was part of inclosed ground would seriously affect the evidence as to the probability of the proprietor having ever intended to devote to the public, what was part of his own private grounds.

The case of *Sanderson v. Lees* (22 Session Cases, 24) is closely in point, and it will be necessary to notice it at some length. There an inhabitant of Musselburgh, and also a burgess and a member of the Musselburgh Golf Club, sought to interdict the Musselburgh Parliamentary Trustees, who represented the magistrates, from granting a feu for building purposes of part of the links (or open ground) on the averment that "it had been used for centuries by the burgesses, inhabitants, and public, for the purposes of recreation and amusement, and had for a period of more than 40 years been used by them, without interruption or hindrance, for practice of the ancient game of golf;" and for the purpose of trying the legal questions, it was admitted "that from time immemorial the links in question had been possessed and used by the inhabitants of the burgh of Musselburgh, for walking and exercise, and for playing the game of golf." The title of the magistrates, so far as it was carried back, was based on an Act passed in the Parliament of Scotland in 1641, intituled "Ratificatioun in favouris of the burgh of Musselburgh," and another Act (a simple confirmation of the other) passed in 1661, intituled "Ratification in favour of the town of Musselburgh."

The Act of 1641 was the ratification of a grant or enfeoffment under the Great Seal of King Charles I., dated 30th November, 1632, by which his Majesty approved of a charter made and granted by "Robert, Principal of Dumferling, with consent of the convent thereof for the time, in favour of the baillies,

council, and community of the burgh of Musselburgh, and their successors, of all the said burgh of Musselburgh, ground and lands thereof, with anchorage, customs, and all other privileges competent to any burgh of barony or regality by the law of the kingdom;" and whereby also his Majesty "of new granted and disposed to the said burgh, baillies, community and inhabitants thereof, the same burgh of Musselburgh, ground and lands thereof, within the bounds and limits following, namely, &c., according to their former possession ('secundum eorum priorem possessionem'), and as the said community was possessed by the inhabitants of the said burgh ('et prout dicta communia per incolas dicti burgi possessa fuit') with power (among other things) to labour and manure such parts and portions of the said community as they should think expedient to the well and utility of the said burgh, and of letting or demising the same for a competent rent." Now it would seem that this charter was really the creation, with the consent of the king, of the burgh, by the convent in whom the estates were previously vested; and if so the case would form a close analogy to that which we are now considering; the convent would be in the position of the lord of the manor, and the corporation of the burgh a grantee from the lord; but the case was apparently treated as if this charter had merely revived the authority of the burghal body, and was in effect a transfer from one set of magistrates to another; and so accordingly we will assume for the sake of any deductions we have to draw from it.

In the year 1851, in order to regulate and secure the debts due by the burgh of Musselburgh, the 14 and 15 Vic. c. 9 (Private Acts) was passed, which provided "that the whole property, estates and effects of the burgh, except as therein otherwise provided, should form a trust-fund for the benefit of creditors, with power to the trustees to feu out the lands vested in them, with this qualification (sec. 8), That whereas the burgesses and the inhabitants of Musselburgh and *the public* claim the privilege of recreation and exercise as well as playing the game of golf and enjoying other amusements in the links of Musselburgh, nothing in this Act contained shall in any manner of way be held to limit or affect such claim, which is hereby reserved entire."

Whether this claim, by the burgesses and inhabitants of Musselburgh and the public, which was thus left untouched by the Act, had any legal validity and could be enforced, was the question in the cause.

The court held that the rights claimed were good, and could not be interfered with: "they were not to be regarded as servitude rights at all. The magistrates, it was true, held the property all along for the community, but the purposes for which it had been admittedly possessed by the inhabitants were not inconsistent with the right of property in the magistrates. These uses had been co-existent with the property from the first, and were a quality (*i. e.* qualification) of the right which the magistrates had therein, and the inhabitants were intitled to protect it from encroachment" (*per* Lord President). "In effect the property had been dedicated to those uses before it came into the hands of the newly created or newly established corporation, and they therefore held subject to such rights" (*per* Lord Ivory). And the court refused to deal with an allegation that enough of ground for the exercise of the privileges claimed would still remain after the proposed feus were given off.

In delivering judgment Lord Curriehill says, "The question raised in this case is of general importance to the burgesses and inhabitants of burghs, because to almost all our royal burghs there are attached commons, or links, of which the burgesses and inhabitants have from time immemorial had the enjoyment for exercise and recreation of different kinds, and the question is now raised whether the magistrates of these corporations have a discretionary power of depriving these classes of these privileges? I think this question must be decided in the negative, in respect that such subjects, which have been so used from time immemorial, are not alienable by the magistrates. It has accordingly been repeatedly decided that the burgesses, and even the inhabitants (although they were neither burgesses nor owners of property) of royal burghs, and burghs of barony, have a right to privileges of the same or a similar character, when these privileges have been enjoyed by the burgesses or inhabitants generally from time immemorial. Thus in the case of Kilmarnock, 19 Dec. 1776, it was found that the magistrates were not entitled to feu ground belonging to the corporation,



which had always been used by the manufacturers and inhabitants of the burgh for bleaching, dyeing, and other purposes. In the case of Burntisland in 1812 (mentioned in a note in 9 Dunlop, p. 293) the magistrates of that royal burgh were found not to be entitled to feu a part of its links, which had been used from time immemorial by the inhabitants and others, for such purposes as the bleaching of clothes, and playing the game of golf. The terms of the judgment are: 'Find that the uses to which the property in question since the acknowledged grant thereof has been applied, sufficiently instruct that it is so far *juris publici* that magistrates, as managers of the property of a burgh, are not entitled to dispose of the subjects in question, so as to defeat or impair the right and interest of the *public* and inhabitants, or the members of the corporation of Burntisland, in the enjoyment of the said public use. Find that the feus, or sales for exclusive possession, of the said subjects are incompatible with the said public user, Therefore discern accordingly.' And the Lord Ordinary (the first Lord Meadowbanks) who decided that case, adds in a note to his interlocutor as the principle on which it was founded, 'The subject here has been held in all times as destined for the public resort of the inhabitants generally, and of the neighbourhood, and of the public, for exercise, pastimes, and various accommodations. It appears to me that the property is held by the corporation for *the public use, which reaches to the inhabitants in general, to the neighbourhood, and to travellers*, and is by no means confined to the members of the corporation. The enjoyment therefore which the members of the corporation may have of these uses must be ascribed, not to their possessing that character, but to their being inhabitants of the town or neighbourhood. I hold therefore that the magistrates can no more exclude *the inhabitants or the public* from the links of Burntisland than the magistrates of Edinburgh could exclude the public from the walks in the meadows, or the links of Bruntsfield or Leith.'

"In the case of Eyemouth," continues Lord Curriehill, "18th December, 1846, an averment that inhabitants of the burgh or barony of Eyemouth, although they were not owners of property in the burgh, had from time immemorial used and enjoyed a bleaching green and a well, situated within the terri-

tory of the burgh, was relevant to sustain the title of the inhabitants for the time being to the uninterrupted use of these subjects, and to defend them against an attempt, by the superior of the burgh, to deprive them of the use of these privileges. In that case, as the privilege, conferred upon the burgh of barony, of electing magistrates had been in disuse, it was held that the person in whose favour the burgh had been created and incorporated, and who was the owner of the subjects, came in that question in place of the magistrates, as representing the corporation, and that he was not entitled to deprive the inhabitants of these privileges, if they should establish their alleged use and enjoyment thereof from time immemorial."

And the learned judge then refers also to the case of *Dyce v. Lady James Hay*, and continues:—"It may also be mentioned, that in a General Report of Commissioners on Municipal Corporations in Scotland in 1835 (p. 32), after an exposure of the dilapidations which had taken place in burghal patrimonies, it is stated that 'out of the wreck of common property, which has escaped the destructive operation of the system we have been exposing, the remainder which still exists may be generally described as of two different sorts; the one of which has been considered in practice as alienable, and liable for payment of debts, the other such as does not properly admit of alienation or incumbrance;' and with reference to the latter class of subjects, it is added that 'the property not usually saleable consists of public buildings, such as churches, town-halls, and market-places, and common greens or grounds set apart for the general use or enjoyment of the inhabitants.'"

Lord Deas, concurring with the other judges, said that "the question was whether the ground had been dedicated to those particular purposes; there could be no doubt, if there had been an actual charter produced so dedicating the ground, it could not have been applied to any other purpose; that the intervening time, between the original grants and the charter of 1632, afforded ample room for possession, whereby some 'old charters not produced, of which there seemed to have been several' (either, as we have said, in the nature of a transfer to a new body, similar to the transmission of a manor from one lord to another, or of a ratification and confirmation of an exist-

ing body), "might be presumed to have so dedicated it; that the verdict of immemorial possession carried back as far as it was necessary to go, and it was difficult to conceive a stronger case of dedication short of dedication by express grant." "This leads to the question," continues his lordship, "as to whether, by the law of Scotland, there can be, by usage, such a dedication of property belonging to a burgh as will exclude the property from being sold by the magistrates, or attached for the debts of the burgh. Now, if this question were open, much might be said upon it. But there can be no doubt that, according to the law and practice of Scotland, such things may and do take place. There is no distinction in this respect between the property of a royal burgh, and the property of a burgh of regality. Now, there can be no doubt that there are portions of the property of a royal burgh, which, in respect to the purposes to which they have been dedicated by usage, can neither be alienated nor attached for debt. The magistrates cannot feu ground which has been dedicated by use to the purposes of a public street. They cannot sell churches, or the patronage of the churches within the burgh. They cannot alienate the town-house, nor the jail, nor the petty customs, nor can creditors attach any of these things. The very bell which hangs in the steeple, though capable of being readily taken away, becomes so dedicated to its particular uses, that there it must remain, although the Corporation is insolvent, and incapable of paying its debts. All this was decided in the case of Auchtermuchty. The principle of dedication by usage being clear, I do not see that there is much difficulty in holding that a piece of ground which, for time immemorial, and presumptively from the date of the original grant downwards, has been used for particular purposes only, is in the position in which, in other circumstances, streets, churches, the right of patronage and petty customs, the town-house, the bell, the prison, have all been found to be."

The result of this case, and of the authorities cited in it, seems to be, that the magistrates of a burgh in whom is vested the full control of all the lands, estates, and effects in the burgh, may so act as to dedicate to the *public* certain parts of such property for the purposes of exercise and recreation, and so as to deprive

themselves, their successors and representatives, of the power of dealing with them afterwards to the prejudice of the public, and that immemorial usage by the inhabitants and others will be sufficient evidence of such dedication.

As such case is consistent with all the Scotch authorities, and the English law as to dedication does not differ from the Scotch law (*per* Lord St. Leonards in *Dyce v. Hay*), it would, in the absence of contrary authorities in the English courts, be decisive of the question, were it not that some distinction might be drawn between the position of the magistrates of a burgh and a lord of a manor ; but it is apprehended that in considering whether a dedication such as we are speaking of could and would in reasonable probability be made, the positions are strictly analogous. As we have seen, the inhabitants within the manor originally held of the lord, who exercised jurisdiction with them or over them in the several courts, and to whom again they were bound by duties and services. As Hallam says ('Middle Ages,' vol. i. ch. 3), "The essential principle of a fief was a mutual contract of support and fidelity. Whatever obligations it laid upon the vassal of service to his lord, corresponding duties of protection were imposed by it on the lord towards the vassal. If these were transgressed on either side, the one forfeited his land, the other his seignior, or rights over it. Nor were motives of interest left alone to operate in securing the feudal connection. The association founded upon ancient custom and friendly attachment, the impulses of gratitude and honour, the dread of infamy, the sanctions of religion, were all employed to strengthen these ties, and to render them equally powerful with relations of nature, and far more so than those of political society." Both the magistrates and the lord, therefore, must be taken to be anxious for the good and welfare of the burgh or manor, though for different reasons ; they both possess full power, as owners of the soil, to dedicate it in the manner suggested, if they will, and there seems no ground why immemorial usage should not stand as evidence against the one, as against the other. The improbability which one might expect at the present day, when the lords of manors claim to have rights of building over the whole, would not exist at the date when the presumed dedication would have taken place ; and it is to such date that we are to look

when calculating probabilities (*Mounsey v. Ienay*, 32 L. J., Ex. 96, *per* B. Martin; and compare Coke's words, "a custom once reasonable and tolerable, if after it become grievous and not answerable to the reason whereupon it was grounded, yet is to be taken away by Act of Parliament," 2 Ins. 664). Until recently it was never supposed that the lord could inclose, except to a very limited extent; and even at the present day lords of manors are not wanting who are willing to dedicate their commons to the public expressly, even if such commons were not to be taken as already dedicated. (See *Report*, 1865, Lord of the Manor of Banstead).

We will, then, proceed to consider whether there are any authorities in the English Courts which really contradict the conclusion to which we have been brought.

In the seventeenth year of Charles II., in the case of *Abbott v. Weekly*, at Oxford, before the Judges in King's Bench (reported Levinz, 176), the defendant pleaded, in answer to an action for trespass for breaking a close, "that all the inhabitants of the village, time out of memory, &c., had used to dance there at all times of the year at their free will for their recreation," and so justified his dancing there; and although it was objected that such a claim "to dance in the freehold of another and spoil his grass" was void, especially as it was laid at all times of the year, and not at seasonable times, and that it was also ill-laid in the inhabitants, who "claim easements, as in *Gateward's Case* (6 Co.), and some other books were, yet they ought to be easements of necessity, as ways to a church, &c., and not for pleasure, as in that case," yet the court held it was a good custom, and "it was necessary for the inhabitants to have their recreation." (Such privileges, however, could not, the case shows, have been *granted* to the "inhabitants.")

This case was followed by *Fitch v. Rawlings* (2 H. Br., 373), in which the inhabitants of a parish claimed by custom from time immemorial to have been used to have enjoyed the liberty of playing at all kinds of lawful games, sports, and pastimes in a certain close at all seasonable times of the year at their free will and pleasure. Here the court acknowledged the validity of the decision in 1 Levinz, saying, "It has been objected that it is not alleged that the pastimes were allowed for the necessary

recreation of the inhabitants, but the case in 1 Levinz decides that it is necessary for the inhabitants to have such recreation, if so it is matter of law."

The case of *Bell v. Wardell* (Willes, 202) must, after the remarks upon it by the Judges of the Court of Exchequer in *Mounsey v. Ismay*, be taken to have been founded on a mistake. The custom laid was for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times of the year; and this was holden bad, because at the time the trespass complained of was committed the corn was standing, although the defendant averred that it was a seasonable time. It ought to have been recognised that the validity of the custom should be decided by the state of things at the time when the custom is presumed to have arisen, when it might have been reasonable, and such a custom would now be held good.

In *Mounsey v. Ismay* (1863, 34 L. J. Ex. 52), a custom, for all the freemen and citizens of a neighbouring city (Carlisle) to hold horse-races over the close of Kingsmoor, on Ascension Day in every year, was held good, and it was held that in pleading such custom, it being claimed for a day certain, it need not be alleged that the day is a seasonable day.

The result so far of these cases is, that a custom such as is stated in *Abbott v. Weekly*, or any custom similar to it, is good, *i. e.* for all the inhabitants of a certain town to claim such right. But the case of *Fitch v. Rawlings*, while it confirmed *Abbott v. Weekly* to this extent, went further, and decided that a plea which was set up for a similar custom, averring the right to be in "all persons for the time being in the said parish" was "as clearly bad as the other plea was good." "How that which may be claimed by all the inhabitants of England," says Mr. J. Buller, "can be the subject of a custom, I cannot conceive. Customs must be in their nature confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom."

Again, in a recent case arising out of the disputes of the turf, the trustees of Newmarket had warned off the race-course a gentleman who had made some very ugly animadversions upon them. The gentleman refused to go, and an action at law was brought. He pleaded an immemorial custom, on the part of

the public, to go and see the races held at Newmarket. The court, in accordance with the decision just cited, decided that the custom having been laid in the Queen's subjects was bad; that the public had no right to be there (according to that custom); but it intimated that if the defendant could have claimed as an inhabitant of Newmarket, he might possibly have maintained the custom.

Another case occurred in respect to Epping Forest. In that case the land inclosed was a portion of Woodford Wells Green, part of the ancient forest, in the manor of Woodford. The people had been in the habit of going there from time immemorial, and making use of it as a public village-green. They laid their claim as being in the inhabitants of the particular village. They first said there was a right of way, and then that the inhabitants were in the habit of playing at all lawful games on the ground. In summing up to the jury Mr. Justice Wightman said:—

“The question is whether there was a way over the spot where the hurdles were put up. In one sense, there was a way there, and everywhere, for it appears that the green was part of the ancient forest, and the effect of the evidence is, that people went wherever they liked, and so in that sense the whole forest was one great way. . . . But there was no distinct evidence of any definite way in any particular direction, and though there were tracks from time to time, which might last for a few weeks or months, there was no beaten or enduring track, in any one direction, which had lasted for years. Then, as to the alleged custom, it is laid in the inhabitants; but the proof is wider than the plea, for it appears that all the world went wherever they pleased. It may be a question whether that would be a good custom in law, and of course, if, in point of fact, it is proved as to all the world, it is proved as to the inhabitants. On the other hand, if the plea be taken to mean that the subject is only in the inhabitants, it is disproved, for the proof shows it to be, if it exists at all, in all the world.” (*Schwinge v. Dowell*, 2 F. & F. 848.)

The effect of all this is to establish the principle stated in Viner's ‘Abridgment:’ “A custom, which may be generally extended to all the subjects in England, and is not warranted by, but contrary to, the Common Law, is void.”

We must then, assuming the truth of this maxim, examine whether it is decisive of the point in question, *viz.* the right acquired by the public by force of user over these open grounds; or whether, in truth, it be not rather a technical rule, which is of value in the matter of pleading, but does not really go to the root of the matter, or affect the true merits of the claim.

If we analyse the rule of law, which allows the validity of custom, we shall see that it is, in truth, a fiction, by which a variety of habits, actions, claims, which have been allowed to continue for a great length of time undisturbed, unquestioned and unexamined, are, when brought to the test of legal validity, and found to lack all legal character, nevertheless protected on the broad principle that men have lived and acted upon the assumption of their legal foundation—that in fact they have become law to them, and that rights and relations have been so affected by the usage, that it would be the greatest injustice to overthrow the superstructure which ages have built up.

But while this is the general character of custom, the application of the rule is most varied. "Custom" is in truth only a name by which different cases, in which usage is allowed to have a governing force, are swept together, for convenience of classification; but the underlying principle upon which each case, as it arises, depends, is distinct in itself, and forms the real test by which the claim is examined, to see whether it conforms with the canon that "every custom must be reasonable." For though the presumption is, that the usage, in derogation of common right, has not grown up without some good ground and legal origin, yet it may be referable to usurpation on the one hand, or submission to force or fraud on the other.

Copyholders may, as we have seen, by custom claim to have a *profit à prendre* in the soil of the lord, although they have no permanency in their estates, and they could not claim the right as appurtenant or appendant thereto; but long usage has given them in fact such an interest in their tenements; and accordingly any claims which freeholders could make of *profits à prendre* on the lord's soil, or otherwise, the copyholders, so rendered fixed in their occupation by usage, can claim likewise.



In the case of the Marquis of Salisbury in the House of Lords, 1861 (*Marquis of Salisbury v. Gladstone*, 9 H. L. Cases, 692), a custom in a manor, that copyholders of inheritance might break the surface, and dig and get clay without stint out of their copyhold tenements, for the purpose of making bricks, to be sold off the manor, was held good at law (*dubitante* Lord Wensleydale). "It might be," says Lord Cranworth, "that the clay was present in such quantities that its removal would tend to benefit and not to impoverish the soil;" while on the other hand, as Lord Wensleydale put it, "the effect of the custom might be to destroy the natural surface of the soil, leaving only a substratum, which might be incapable of cultivation, exposed below;" and so, between these two opposite considerations, the judgment would have to be fixed, whether it was likely that the lord would originally have granted to his tenants the privilege which the user seemed to imply.

A custom was held good, which was claimed for the men of Kent, after fishing, to dig on the land adjoining the sea, and pitch stakes for hanging their nets to dry (see *Blundell v. Catterall*, *per* J. Holroyd, 3 B. and Ald. 294, and *Tyson v. Smith*, 9 Ad. and Ellis, 412).

This would be upon the presumption of dedication of the soil for that particular purpose by the owner of the soil, just as the validity of a custom to the use of a towing path by the side of a navigable river, as alluded to in *Ball v. Herbert* (*supra*), would rest upon a similar dedication by the owner of the soil; and it seems clear that a right can, in the same way, be acquired by the public for unloading and mooring on the banks of a navigable river; and in that case the ships may stay as long as they please, so long as the right is not exercised for malicious purposes (*per* Wood, B. Anon. 1 Camp. 517).

In *Tyson v. Smith* a custom was held good, that at fairs holden at certain times of the year on some part of the commons and waste of a manor, to be named by the lord of the manor, every liege subject, exercising the trade of a victualler, might enter at the time of the fairs, and for the more conveniently carrying on his said trade, erect a booth, &c., and continue the same for a reasonable time after the fairs, paying 2*d.* to the lord. "The custom in fact," says Tindal, C. J., "comes at last to an

agreement, which has been evidenced by such repeated acts of assent on both sides from the earliest times, beginning before the time of memory and continuing down to our own times, that it has become the law of the particular place;" but the true principle is rather, that the lord of the manor is presumed, for the encouragement of fairs in his village, to have dedicated his waste for that purpose, with certain restrictions and certain reservations; and the case of the Marquis of Breadalbane (7 Bell, Appeal Cases, 43, cited in *Dyce v. Lady James Hay*) shows that where such dedication could not, from the want of connection (such as that of lord to tenants) between the owner of the soil and those immediately or remotely benefited, be presumed, no length of time or repetition of agreements would have the effect stated in the judgment of the Chief Justice.

In that case a right was claimed for all persons driving their cattle from the north of Scotland to the south, along a certain drove road, to rest at certain determined spots, or "stances," and there to depasture their cattle over the neighbouring ground upon payment to the proprietor of certain fixed sums, according as the right had been enjoyed from time immemorial, and the House of Lords held that a claim for an indefinite number to take the produce of the soil under these circumstances could not be supported, and that the payments were conventional matters of contract and not made in the enforcement of a right.

In *Rogers v. Brenton* (10 Q. B. 26, recently recognised as good law in *Ivimey v. Stocker*, 1 L. R., Ch. Ap. 396) the following custom was found to exist in fact: "Any person may enter on the waste land of another in Cornwall, and mark out by four corner boundaries a certain area, and a written description of the plot of land so to be taken is recorded in an immemorial local court, called the Stannary Court, and proclaimed at three successive courts held at stated intervals: if no objection is successfully made by any other person, the court awards a writ to the bailiff of the court, to deliver possession of the said 'bounds or tin work' to the bounder, who thereupon has the exclusive right to search for, dig, and take for his own use, all tin and tin ore within the described limits, paying to the land-owner a certain customary proportion of the ore raised, under

the name of toll tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain." It was held that a custom to preserve the right by a mere ceremony of annual renewal, without working, was unreasonable and bad in law, and that although the alleged custom involved a claim of a profit *in alieno solo*, it would have been good, if *bonâ fide* working had been found to be obligatory under it. "Bounding," says Lord Denman, "is a direct interference with the Common Law rights of property. The only things which make this reasonable (*i.e.* good as a custom) are the tender of toll tin to the owner, and the benefit to the public secured thereby in the extraction of the mineral from the bowels of the earth." And so, although from the usage it might be presumed that the owner had dedicated his land for the common benefit, himself retaining a compensation, yet that he should consent to be kept out of the enjoyment of his land, which should remain inclosed, and profitless to himself or others, could not be supposed; and a claim resting on such basis would be bad.

In *Race v. Ward* (4 Ell. and B. 702) a custom, from time immemorial for all the inhabitants of the township, in which a certain close was situated, to take water from a well, or spring, in that close, and carry the same to their houses, to be used for domestic purposes, was held good, and a distinction was drawn between water, and a *profit à prendre* generally. "A claim to take part of the soil," says Lord Campbell, "like sand or clay or stones, or the produce of the soil, like grass or turves or trees, made by all the inhabitants of a district, would clearly be bad, for there might be nothing left for the owner of the soil; and that would be inconsistent with the right of property in the soil; but the spring of water is supplied and renewed by nature, and there is nothing in the claim here made so large as to preclude the ordinary uses of the property by the owner of the lands affected." That is, in effect, there is in this case nothing to prevent our supposing that the owner of the lands originally submitted to such user of them by the inhabitants.

In *Elwood v. Bullock* (6 Q. B. 383) a custom in an immemorial borough, that "every liege subject, using the trade of a victualler,

had during certain annual fairs been used, &c., for the purpose of carrying on his said trade, to enter upon any part of a certain close, through, over, and along which there was a public highway, but leaving open a sufficient part of the said close, and also of the said highway, for the liege subjects, &c., to go, return, pass, &c. in and along the said highway, and for carrying on his said trade to erect a booth there, and to continue such booth until a reasonable time after the end of such fair, paying a reasonable compensation to the owner of the soil," was held good, "for," says Lord Denman, "it may well be that the mayor, aldermen, and burgesses may have had a right of holding a fair on the spot in question before the same became a highway, and therefore, that the dedication to the public may have been subject to a partial interruption during the continuance of the fair, for a certain limited and not unreasonable time" (cf. *Morant v. Chamberlain*, 30 L. J. Ex. 299).

Again, the recognition, by the law, of agricultural usage, mercantile usage, &c., and the annexation of such customary incidents to express contracts, goes upon the principle that it was in relation to such, and with the intention of being bound by such, that the parties contracted; but if the usage alleged is such that the courts cannot presume that any persons contracting would consent to be bound thereby, the custom is said to be bad (*Bottomley v. Forbes*, 5 Bing. N. C. p. 128).

We see then that, in fact, wherever a custom is said to be good, it is but a vague way of stating a principle, by which long usage, in the particular case, is allowed to retain its acquired influence; accordingly when it is held that the claim, in *Abbott v. Weekly*, for the inhabitants of a village to recreate themselves, as they have been accustomed, on a certain spot, is a good custom, the real meaning is, that long usage will be relevant to raise a presumption that the owner of the soil intended to dedicate, and in fact did dedicate, the spot for the purposes in question (cf. *Dyce v. Lady James Hay*, *supra*, per Lord St. Leonards).

But the plea of custom being, in its nature, only a *dernier ressort*, almost a subterfuge, an answer when any other answer would be subtle and difficult, (*c'est l'usage ici*, as a Frenchman would say, with a shrug, when pressed for a reason for some conventional rule), the courts will consequently not allow such

vague defence to be set up, when there is palpably and obviously another, of a more recognised and definite character, close at hand. It is upon this principle that the Canons of Customs—1, that they should be immemorial; 2, that they should be confined to a limited space or number—are really based.

To be immemorial, properly speaking, they should go back to the time of King Richard I., but that is not in fact necessary, as after a certain time the remainder is for the most part presumed; but it would be fatal to a custom to show when it commenced, because then it would be possible to examine its validity on other grounds than the mere vague fact of user, and the fiction would not be required; and so likewise that it should be confined to a limited space or number; for otherwise, if prevailing everywhere, it would be of Common Law, and if extending to all, it would be *publici juris*.

The decision, then, that a custom for all the world to claim similar rights to those established in *Abbott v. Weekly* is bad, merely repudiates the use of the special plea of custom, as under the circumstances such vague defence could not be required; and it is not fair to shield yourself behind bulwarks intended only for the weak, when the nature of your rights, if any, could be as advantageously maintained on the open ground.

We may now, then, approach the subject afresh, and inquire whether there is any reason why evidence of immemorial user should not be sufficient to establish a dedication by the lord of the open spaces in his manor to the special uses claimed by the public; whether, in short, there is any reason why these lands, dedicated to the recreation of the public, should not be subject to rules and principles analogous to those which relate to land dedicated to the passing to and fro of the public, that is, to highways.

The case of *Poole v. Huskinson* (11 M. and W. 827) decided that there may be a dedication to the public for a limited purpose, as in a footway, horseway, or driftway (just as we contend that the dedication to the public, with regard to the waste lands, is for exercise and recreation), but there cannot be a dedication to a limited part of the public; and that such dedication, where no dedication to the public was intended, would be simply void for want of the *animus dedicandi*.

Now *Abbott v. Weekly*, as we have seen, showed that immemorial user was sufficient to prove a dedication for purposes

of recreation (for that is the underlying principle upon which the custom there is held to be valid), and such is undoubtedly good law; it would follow conclusively, therefore, upon principle, from the union of the two cases, that a dedication to *the general public* can be established by such immemorial user: the inhabitants being in truth allowed, under the vague plea of custom, to maintain their claim, only because they form part of the larger body of the general public, to whom the dedication must be presumed to have been made;—as Lord Meadowbanks says, in the case of *Burntisland* above quoted, that the burgesses would claim not in that character, but as inhabitants of the town or neighbourhood,—that is, in their general and not in their special capacity. It might have been difficult perhaps to have shown user by the general public; and it would not be right that the inhabitants of the district should be deprived of the benefit of the dedication because the general public had not availed themselves of it.

A highway is dedicated for the purpose simply that the public may have the benefit of passing and repassing along it; and if a man uses a highway for any other and different purposes, as in search of game (*The Queen v. Pratt*, 4 Ell. and B. 860), he is in law a trespasser, the soil of the land still remaining in the owner, subject merely to the right ceded to the public of passing along it; so the rights of the lord of the manor in the common would remain intact, except so far as they had been relinquished to give to the public a specific right and benefit.

And there is no great antecedent improbability in such cession to the public, as it would not in effect be more detrimental to the lord's interests than a similar cession to the inhabitants of the district; and supposing the lord to have the desire to dedicate to the general neighbourhood, if he was told he could not, as in truth he could not, dedicate the ground to them unless he dedicated it to the whole public (see *Poole v. Huskinson*, and *Abbott v. Weekly*, cited above, and *Lockwood v. Wood*, 6 Q. B. 64, where the Exchequer Chamber held that a grant by deed to "inhabitants" of the right of going on the grantor's land and pitching stalls there on market-days without payment was void), would he on that account have hesitated to give the rights to the whole body? for according to his own original wish, any one who came to reside in the district would have

the privilege; and what was there practically to limit that number?

The case would thus be similar to that of *Reg. v. Broke* (1 F. & F. 514), where the owner of a certain road had, from private regard to a particular class, not communicated to the persons of that class, allowed them and others to use the way; and it was held that a *public* right of way was gained by user after the lapse of twenty years.

The point for which we are now contending is not within the principle upon which the decision in *Attorney-General v. Chambers* (5 Jur. N. S. Ch. p. 745) was founded, that "where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble, proof must be given of constant uninterrupted user and enjoyment of the privilege, with the knowledge and acquiescence of the party interested in resisting intruders, in order to raise the presumption of a grant" (in this case a dedication); for that was the case of trespass by cattle from a neighbouring pasture on to the sea-shore, and cattle would not respect notice-boards; while in respect of commons, the owner would be bound, if he desired to rebut the presumption of dedication, to have evidenced his wish; as Lord Ellenborough says (1 Campbell, 261), that the owner of the soil should do who throws open a passage, "if he neither marks by any visible distinction (as a chain or bar) that he means to preserve his right over it, nor excludes persons from passing through it by positive prohibition, he shall (in course of time) be presumed to have dedicated it to the public.

If, again, it is said that the fear of unpopularity has alone prevented each successive lord from interfering with the enjoyment by the public, the answer is, that the amount of unpopularity which would have attended an adverse action on his part is, on the other hand, the measure of the popularity with which an express dedication to the use of the public would have been followed, and that in dealing with presumptions we must take it that considerations of this latter kind weighed with some one of the many successive lords in inducing him to make the dedication supposed. And there would have been no difficulty in making the dedication: any unequivocal act showing an intention would have sufficed, just as in the case of a highway

"no particular time is necessary for evidence of a dedication, . . . . if the act of dedication is unequivocal it may take place immediately: for instance, if a man build a double row of houses opening into an ancient street, and sells or lets the houses, that is *instantly* a highway" (*per* Chambre, J., *Woodyer v. Hadden*, 5 Taunt. 137).

The claim here made for the public is not a claim to take the produce off another's soil, as in the Marquis of Breadalbane's case (cited above), as no use which the proprietor could have made of the ground (other than inclosing and building, which was practically already interdicted by the commoners' rights, and could not originally have been considered of any appreciable value) is interfered with or affected.

Nor again is this a case similar to the public parks which belong to the Crown. With reference to these, Cockburn, C. J., Sir Richard Bethell (now Lord Westbury), and Mr. Willes, gave it as their opinion that the Crown "had, in point of law, a right to exclude the public from the parks, as they had not acquired any legal rights by reason of the continued license and favour of the Crown;" for the Crown have, by the regular supervision and control which they have maintained over the times of opening and closing the gates and the general management of the place, constantly rebutted the inference of dedication, which long sufferance might be supposed to create.

We come then finally to this, that in respect to these open spaces, as in respect to roads, towing-paths, bathing-places, spots for mooring and unloading by the sides of navigable rivers, the open user, as of right, by the public, raises a presumptive inference of dedication, requiring to be rebutted; and where such user is proved, the onus lies on the person who seeks to deny the inference resulting from it,—to show negatively, that the state of the title was such that no one could make a valid dedication (*R. v. Petrie*, 4 E. & B. 737). This it would be impossible to do, as the lord of the manor has always been owner of the soil, subject only to the rights of commoners, which would not be interfered with by the dedication supposed; and as the user has been immemorial, it would be impossible but that some one of the many successive lords has had an absolute and unlimited estate.



We may therefore fairly conclude from the foregoing considerations, coupled with the evidence of user to which we have previously referred, that (except perhaps where the Crown is lord of the manor) the rights of the public over the open spaces round the Metropolis are such that no dealings by the lord would be possible or lawful which would have the effect of depriving the public of the privilege of roaming at their pleasure, for exercise and recreation, over the whole extent of the ground.

V.—THE POLICY WHICH HAS GENERALLY INFLUENCED THE  
LEGISLATURE IN RESPECT OF THE INCLOSURES OF OPEN  
SPACES.

The statutes of Merton and Westminster, with which we have already dealt, differ from Inclosure Acts properly so called; for the former operated by repressing the commoners into narrower limits, so as to leave a certain part of the waste free from their incumbrance and completely in the hands of the lord; they enabled the lord, in fact, for the public good, which would arise from increased cultivation, to take back again what he had once given, as being no longer really wanted for the purposes for which the original gift was intended: the Inclosure Acts, on the other hand, recognise the concurrent rights of the lord and the commoners, but for the sake of agricultural benefits allot to each certain portions of the whole to be held in severalty, in place of and to compensate for the rights which had been previously enjoyed over the entire space in common.

Before A.D. 1800 as many as 1600 or 1700 private Inclosure Acts were passed, with special provisions inserted in each, according to the circumstances of the locality, for ascertaining the rights of the several parties interested, and allotting portions of the "common" or "commonable" lands accordingly; but there was no general Act in relation to these inclosures until in July, 1801 the Bill, 41 Geo. III. c. 109, called "Sir J. Sinclair's Inclosure Bill," was passed, "for consolidating in one Act certain provisions usually inserted in Inclosure Acts." This diminished the length of the several private Acts, and the

consequent expense, but still in each case special application had to be made to Parliament.

Between the passing of this Act and "The General Inclosure Act, 1845," about 2000 private Inclosure Acts were passed (*Report on Commons Inclosure*, 1844, qu. 185).

In 1836 the statute 6 & 7 William IV. c. 115, intituled "An Act for the inclosure of open and arable fields in England and Wales," after reciting "that it would tend to the improved cultivation of open and common, arable, meadow, and pasture lands and fields now intermixed, if the proprietors of such lands in any parish were enabled by a general law to divide and inclose the same," proceeds to enact certain provisions by which any open and common arable fields (including any untitled slips or balks therein), or any open and common meadow and pasture lands or fields in England or Wales, known by metes and bounds or occupied according to known and legal rights, might be inclosed with the consent of two-third parts in number and value of the persons interested therein.

The defects which had attended Inclosure Acts were chiefly in point of expense and delay, first in obtaining the Act; secondly, in the employment of commissioners and surveyors to carry it into effect.

The commissioners were appointed by the parties themselves more as partisans than as judges, and the proceedings, which were prolonged by jealousy and indolence, terminated only after long years in an award which, after all, frequently lacked legal validity from the intervening death of some one of the commissioners by whom it ought to have been signed (*Report*, 1844, pp. 258, 259 *et passim*).

The first kind of expense and delay was intended to be met by the General Act last noticed, but the second still remained.

There was too a further grievous incompleteness in the Act, inasmuch as it only properly applied to lands held in severalty during some proportion of the year, and to slips and balks intervening between the cultivated lands. It applied only to the "commonable lands," as we have before distinguished them, and not to the "commons" and uncultivated lands.

The advantages, however, of the Act were so great and the demands for arable land so pressing, that inclosures were made

under it of lands which did not properly come within its scope, and the persons to whom allotments were made were placed in the situation that they had no legal holding as to their lands, and could only acquire a right to them by efflux of time (*Rep.* 1844. qu. 194).

To meet all these inconveniences, "The General Inclosure Act, 1845" (8 & 9 Vic. c. 118), was passed, with the view, as stated in the preamble, "to facilitate the inclosure and improvement of commons and other lands now subject to rights of property which obstruct cultivation and the productive employment of labour, to facilitate such exchanges of lands and such division of lands intermixed or divided into inconvenient parcels as might be beneficial to the respective owners, and to provide remedies for the defective or incomplete execution, and for the non-execution, of powers created by General and Local Acts of Inclosure, and in certain cases to authorise the revival of such powers."

The time when this Act was passed was (as pointed out by the Committee of the House of Commons, *Rep.* 1844, p. iii.), especially favourable to such General Act; first, because the waste and other lands to which such measure would apply were freed by the operation of the Tithe Act from any liability to an increased payment upon their cultivation or improvement; secondly, because the introduction and application of a more cheap and skilful system of draining and various artificial manures to land of this description, and the increase of agricultural enterprise, afforded the prospect of raising them to a high degree of fertility at a moderate cost; and thirdly, the expense incident to the partition of all such lands amongst the parties entitled thereto would be greatly decreased, as in many instances the existing maps and valuations made for the purpose of the Tithe Act might be rendered available for the purposes of inclosure.

The principal feature of this Act is the appointment of a central body of commissioners, paid by the public, and so uninfluenced by party feelings, styled "The Inclosure Commissioners for England and Wales," with whom the consideration of the expediency of an inclosure, and also the details of its execution, are made to rest.

The distinction was still kept up in the Act between the "commonable" and the "common" lands, as with regard to the latter the commissioners were not permitted to inclose except with the previous consent of Parliament. A corresponding limitation was also made (s. 14) respecting lands situate within fifteen miles of the City of London, or within two miles of any city or town of 10,000 inhabitants, or within two miles and a half of any city or town of 20,000 inhabitants, or within three miles and a half of any city or town of 70,000 inhabitants, or within four miles of any city or town of 100,000 inhabitants; but by the 15 & 16 Vic. c. 79, the consent of Parliament is made necessary to the inclosure of any land whatever under the provisions of the Act.

The parties desiring an inclosure communicate (sec. 25) with the commissioner, and the course then pursued is described by one of the present commissioners as follows:—

"We send down for the information we require, and also a form of application to us, setting forth all the circumstances connected with the rights and conditions of the land to be inclosed, and the rights of parties. That comes up signed by a third of the persons who are interested *primâ facie*, and we look at it to see that it is properly signed; and if we think it be so, we then send an assistant commissioner down, to hear objections and to investigate the matter generally. A hearing is held after notice, and he makes his report upon all the circumstances of the case; upon that, if we find the opposition is not great, and if we find that there are advantages in an agricultural point of view,—because I take it we do not consider that it is for us to determine whether, upon public points of view, it is right that they should be inclosed, because they come before Parliament afterwards—if we find that it is right in all the details, we make a provisional order. That provisional order goes down to the parish and remains there for three weeks; it is then signed by two-thirds of the interests, and then we register it and report to Parliament" (*per* Mr. Wingrove Cooke, *Rep.* 1865, qu. 120).

The Act (sec. 15) saves town-greens and village-greens from being subject to inclosure under its provisions.

With regard to allotments to be made upon any inclosure for

the purposes of exercise and recreation it enacts (so far as is material for our present purpose) as follows (sec. 30):—

“It shall be lawful for the commissioners to require, and in their provisional order to specify, as one of the terms and conditions of such inclosure, the appropriation of an allotment for the purposes of exercise and recreation for the inhabitants of the neighbourhood, not exceeding the quantity hereinafter mentioned, applicable to each case; that is to say, where the land to be inclosed shall be situate in any parish the population of which, according to the then last previous Parliamentary census, shall amount to or exceed 10,000 persons, ten acres; where the land to be inclosed shall be situate in any parish the population of which, according to such census, shall amount to or exceed 5000 persons, and be less than 10,000 persons, eight acres; and where the land to be inclosed shall be situate in any parish the population of which, according to such census, shall amount to or exceed 2000 persons, and be less than 5000 persons, five acres; and in every case, except as aforesaid, not exceeding four acres.”

And the Act further contained (sec. 31, &c.) provisions for the allotment, if the commissioners thought fit, of certain portions of the land to be inclosed for the benefit of the labouring poor.

Subsequent statutes have amended and enlarged this Inclosure Act, 1845, but they do not concern us here. How far it has been acted upon for the purpose of inclosures within fifteen miles of London will appear from the subjoined statement which was made by one of the Inclosure Commissioners (Mr. George Wingrove Cooke), to the Committee of the House of Commons, and published in the *Rep.* 1865:—

“Since the passing of the General Inclosure Act, in 1845, 1562 acres of land, within fifteen miles of London, have been inclosed under the General Inclosure Acts. Only 112 acres, however, of this extent were waste lands, the remainder being subject to certain limited and well-defined rights.

“There are also five inclosures, comprising altogether 1651 acres of land, within the above distance, now proceeding; but, in each of these cases, allotments for recreation, or for the labouring poor, have been insisted upon.



Upon these Inclosure Acts generally we may make these observations:—

1. That the whole scope and object of the Acts was for the benefit of agriculture, the amelioration, morally and pecuniarily, of the poor in the neighbourhood, by increasing the demand for labour and providing regular employment instead of the precarious help which the common afforded, and the cessation of injustice and tyranny in stocking the commons on the part of the more powerful to the exclusion of the weak; not the aggrandisement or convenience of the lord. (See *Rep.* 1844, *passim*.) The lord had indeed a veto upon the inclosure by reason of his interests being the greatest involved, but he could not avail himself of the power of inclosure unless it were for the common good, and of this the consent of the large majority of the commoners and of the Inclosure Commissioners was considered a sufficient test.

2. That Parliament has in its own hands the full control of the inclosure, to allow or refuse it as it may see fit; and further, that, inasmuch as the purposes for which the Acts were passed were public, it would be no injustice to the lord if assent were withheld, where, in the view of the Legislature, it would be to the general injury that advantage should be taken of the statutory enactments.

3. That the provisions contained in the Acts for allotments for the purposes of exercise and recreation are not sufficient for the wants of the Metropolis, and that Parliament must not consent to the inclosures of the commons in the metropolitan area being made under such conditions.

No part of the open spaces in the metropolitan area can be well spared for the recreation of the inhabitants (*Rep.* 1865, iv.), and the powers of the commissioners to recommend the allotment of recreation ground are strictly limited. It is true that in the case of the inclosure of Chigwell, when the commissioners had allotted some seven or eight acres to be left open, Parliament refused to sanction the scheme unless fifty acres were agreed to be set aside for the general use of the inhabitants (*Rep.* 1865, qu. 77); but the exception from inclosure even when similarly enlarged is not adequate to the requirements of the Metropolis, which cannot afford to have its present breathing spaces in the least contracted.

Again, the section (30) of the Act which deals with ground to be allotted for the purpose of exercise and recreation says that it shall be "for the inhabitants of the neighbourhood," and accordingly cases would occur, and have occurred (cf. *Rep.* 1865, 5548), where the local inhabitants would dispute the right of the general public to use it; but we require that the open spaces which we now possess should be secured and preserved for the benefit of the whole community, and not be limited for the enjoyment of the inhabitants of any particular district.

VI.—THE COURSE WHICH THE LEGISLATURE HAS RECENTLY  
ADOPTED WITH REGARD TO METROPOLITAN COMMONS.

The inapplicability of the Inclosure Acts to the case of the metropolitan commons, and the necessity for new measures, has at the very close of the recent session, almost as we write, been definitely recognised by Parliament, and "The Metropolitan Commons Act, 1866," received the royal assent on the 10th of August last.

The nature and scope of the enactments contained in it we propose shortly to consider.

The Act extends to all "commons" situate within the Metropolitan Police District, as defined at the passing of the Act, *i. e.* within a radius of fifteen miles from Charing Cross.

In the word "commons," both "commonable" and "common" lands (as we have before distinguished them, according as they are or are not enjoyed in severalty during any part of the year) are alike included, as the word is interpreted to mean land subject, at the passing of the Act, to any right of common.

As amended in committee, it was proposed that the Act should be entitled "The Suburban Commons Act, 1866," and should extend to commons within a certain distance from other large towns besides the Metropolis, according to their population, in the same way as we have noticed that there was a limitation in the Inclosure Act, 1845, against the commissioners inclosing in the neighbourhood of such towns without the express consent of Parliament; but the Act was eventually confined to the Metropolis, leaving the less pressing needs of other towns to be considered and dealt with hereafter.

"Manor" is to include reputed manor, and the commissioners



referred to are "the Inclosure Commissioners of England and Wales," appointed, as we have seen, under the Inclosure Act, 1845.

The 5th section enacts as follows:—

"After the passing of this Act the commissioners shall not entertain an application for the inclosure of a metropolitan common, or any part thereof; but nothing in this Act shall interfere with the carrying on and completion of proceedings under any provisional order of the commissioners confirmed by Act of Parliament passed before or in the present session; and notwithstanding any proceedings taken under any Act other than this Act, or any provisional order of the commissioners made but not already confirmed by Act of Parliament, proceedings may be taken under this Act in relation to any metropolitan common."

This is the one positive provision contained in the Act; the rest is, as we shall see, essentially permissive and tentative; but the effect of this section is to declare plainly that Parliament will not consent to the inclosure of any more of the metropolitan commons under the Inclosure Act, 1845, and, so far as they are concerned, entirely to supersede its operation.

The idea of the Act is that with a view to secure permanently as many as possible of the metropolitan commons intact for the benefit of the public, schemes for that purpose, specially adapted to the circumstances of each common, and the several rights of the persons interested therein, should be proposed by the lord of the manor or any of the commoners, or by the "local authority" of the district where the common in question is situate, and that such scheme when settled and perfected as far as it can be, should be submitted to Parliament for confirmation, and should then become binding as law; but every scheme must provide for due compensation being given to all persons whose private rights would be injuriously affected by the measures proposed. The Act further contains provisions to enable the crown to deal freely with its manorial and other rights affecting the metropolitan commons.

The "local authority" is not the same throughout the metropolitan area, and the expression is in the first schedule to the Act definitely determined.

If the common is situate wholly or in part within the Metropolis, as defined by "The Metropolis Management Act, 1855" (which fixed the term by an enumeration of parishes, and in fact included  $117\frac{1}{2}$  square miles, *Rep.* 1865, qu. 423, *per* Mr. Thwaites), the Metropolitan Board of Works is the local authority, and the local rate (to which we shall have to allude presently) is to be taken to be "the rate leviable for defraying the expenses of the Board in the execution of "The Metropolis Management Act, 1855," and the Acts amending the same.

If it is situate wholly or in part within the district of a local board, constituted under "The Public Health Act, 1848," and "The Local Government Act, 1858," or one of them, and no part is situate within the Metropolis as above defined, the local board is the local authority, and the local rate is to be taken to be the general district rate.

Lastly, as to any other metropolitan common, the local authority is the vestry of the parish in which the common or any part thereof is situate, and the local rate is to be taken to be the poor rate.

Let us now examine the provisions of the Act more minutely.

The 6th section enacts as follows:—

"A scheme for the establishment of local management with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common, and to the making of by-laws and regulations for the prevention of nuisances and the preservation of order thereon, may be made under this Act, on a memorial in that behalf presented to the commissioners by the lord of the manor or by any commoners, or by the local authority, or in case of a common extending into the districts of two or more of the bodies described in the first schedule to this Act, then by any one or more of such bodies."

The commissioners are then authorised, if they think fit, to prepare a draft scheme in accordance with the memorial, and having given every facility for the publication of its contents at the expiration of two months, may refer it to an assistant commissioner, who shall hold sittings in the neighbourhood of the common in question, and take and receive any evidence or information offered, and hear and inquire into any objections or

suggestions which may be made concerning the scheme or the common (secs. 7-11).

The commissioners having received a report from their assistant commissioner, shall proceed themselves to consider the matter, and, if they think fit, finally settle and approve of the scheme in such form as they may think expedient (secs. 12 and 13).

The scheme is to state what rights (if any) claimed by any person or class of persons are affected by it, and in what manner and to what extent they are affected thereby, and whether or not the scheme has been in relation thereto consented to by that person, or class of persons, or any of them (sec. 14).

The 15th section enacts as follows:—

“No estate, interest, or right of a *profitable or beneficial nature* in, over, or affecting a common shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme without compensation being made or provided for the same, and such compensation shall, in case of difference, be ascertained and provided in the same manner as if the same compensation were for the compulsory purchase and taking or the injurious affecting of lands under the provisions of ‘The Lands Clauses Consolidation Act, 1845,’ and ‘The Lands Clauses Consolidation Acts Amendment Act, 1860.’”

Any person who feels himself aggrieved by the decision of the commissioners, as exhibited in the scheme, may have his rights determined by a feigned action at law in the same manner as was provided for similar cases upon inclosures under “The General Inclosure Act, 1845,” sec. 56.

The Act then provides for the printing and publication of the scheme certified by the commissioners and the reference of it to Parliament, with a full report of all matters relating to it, the grounds upon which it has been approved, the objections (if any) made thereto and overruled, and all proceedings had in respect of these objections, and the ground upon which they have been overruled (secs. 17, 21).

When referred to Parliament the scheme will have all the incidents of a Private Bill, and will be binding in the form in which it is finally confirmed and passed as an Act (secs. 22, 23).

The sections 24, 25, and 26 are important, as they provide for the expenses which will be incurred in the preparation and execution of the scheme. They are as follows :—

“24. All expenses incurred by the commissioners in relation to any memorial, or to any scheme consequent thereon, shall be defrayed by the memorialists, or by any ratepayers or inhabitants of the parish or district in or near to which the common is situate, or of the Metropolis, willing and offering to defray those expenses, or by the local authority if willing and offering to defray the same; and the commissioners may, if they think fit, on or at any time after the presentation of the memorial, require the memorialists or those ratepayers or inhabitants, or any of them, or the local authority having offered as aforesaid (as the case may be) to pay to the commissioners such sum as the commissioners think requisite for or on account of those expenses, or to give security to the satisfaction of the commissioners for the payment of those expenses on demand.

“25. The local authority may, in relation to any metropolitan common for which they are the local authority, and the Metropolitan Board of Works may, in relation to any metropolitan common (although not one for which they are the local authority), contribute such amount as they think fit (in a gross sum or by annual payments or otherwise) towards the expenses of executing any scheme under this Act when confirmed by Act of Parliament, including the payment of the compensation (if any) to be paid in pursuance thereof.

“26. All expenditure incurred by a local authority under this Act shall be defrayed by them out of the local rate, and all expenditure incurred by the Metropolitan Board of Works under this Act, in cases where they are not the local authority, shall be defrayed by them out of the rate which in the first schedule to this Act is described as the local rate in connection with the Metropolitan Board of Works, and the amount requisite in that behalf respectively shall be raised by means of such respective rate accordingly.”

We may observe here that the principle of meeting such expenses partly by local rates had been already recognised by the Legislature in the 23 Vic. c. 30 (1860), which enabled the ratepayers of any parish or district to purchase or lease lands,

and to accept gifts and grants of land, for the purpose of forming any public walk, exercise, or playground, and (with the assent of a majority of at least two-thirds in value of the rate-payers assembled at a meeting for that purpose) to levy rates not exceeding sixpence in the pound for maintaining the same, and for removal of any nuisances or obstruction to the free use and enjoyment thereof, and for improving any open walk or footpath, or placing convenient seats, or shelters from rain, and for other purposes; but with the condition that, previous to any such rate being imposed, a sum in amount not less than at least one-half of the estimated cost of the proposed improvement shall have been raised, given, or collected by private subscription or donation.

To return to "The Commons Act, 1866":—

Schemes under that Act, when confirmed by Parliament, may from time to time be amended by proceedings similar to those adopted with regard to the original scheme (sec. 27).

The Act then contains provisions as to the persons to act for and on behalf of those who are interested and who are under disability (sec. 28); determines who are to give consents that her Majesty may require to give with respect to her crown and duchy rights respectively (sec. 29), and authorizes the appointment by power of attorney (free from stamp duty) of agents for the purposes of the Act on the part of any who are interested in the commons (sec. 30 and sched. 2).

The commissioners are authorized to take conveyances of any estate, interest, or right in, over, or affecting a common for the purposes of a scheme under that Act, notwithstanding the provisions of the Act 9 Geo. II. c. 36, "To restrain the disposition of lands whereby the same become unalienable."

A similar exception to the last-mentioned Act had already been made by "The Recreation Grounds Act, 1859" (22 Vic. c. 27), which, after reciting "that the want of open public grounds for the resort and recreation of adults, and of playgrounds for children and youth, is much felt in the Metropolis and other populous places within the realm, and by reason of the great and continuous increase of the population and extension of towns such evil is seriously increasing, and it is desirable to provide a remedy for the same," enacts "That any lands may

be lawfully conveyed to trustees, to be held by them as open public ground for the resort and recreation of adults, and as playgrounds for children and youth, or either of such purposes, and for any estate, and subject to any reservation, restrictions, and conditions which the donor or grantor may think fit, and that the grant shall be valid notwithstanding the Act of 9 Geo. II. c. 36."

Lastly, "The Metropolitan Commons Act, 1866" (sec. 32) gives power to the Crown to grant (by warrant to be issued as therein provided) to any persons or body, for such estate or interest, and on such terms, and subject to such conditions, as to her Majesty, her heirs or successors, seem meet, all or any part or parts of the open and unclosed lands, being wastes of the royal manor of East Greenwich in the county of Kent (which seems to be the only manor vested in the Crown within the metropolitan area), and also to grant all or any of the rights of common which her Majesty, her heirs or successors, has or have for the time being in, over, or affecting any metropolitan common, and which might by law be so granted by a private person entitled absolutely thereto, and, in every such case, such persons or body, their heirs, successors, executors, or administrators, shall have full capacity to take and hold the same lands or rights.

Such, then, is "The Metropolitan Commons Act, 1866," the provisions of which are well considered, and are likely to prove of the greatest practical utility. With the encouragement that the Act affords, we may be confident that in respect of almost all our metropolitan commons, schemes will be proposed by men well able to judge of the requirements of each particular case, and that, taught by them, the Legislature will give its support and sanction to measures which will place the whole question on a permanent and satisfactory footing.

We cannot disguise the fact that sooner or later the lord's claims must be met by a hard legal struggle, but it is to that end that we have been addressing ourselves in these pages; and if the conclusions to which we have been brought are, as we believe, well founded, we have no cause to fear the result.

We have concluded that side by side with the lord's rights are the concurrent rights of the commoners, which can be applied

as an effectual check upon any attempt on the part of the lord to spoil or destroy the pasturage or other produce of the surface; and further, that in bar of his claims to build over the common, *the public* can legally maintain their right to have the common left open and uninclosed. If this is so, we may fairly congratulate ourselves that we are not left at the mercy of the owners of the lands which it is all-important for us to have to use, so as to be obliged to make hard bargains with them and to sacrifice our claims to the best parts of the common in order to find the means of purchasing the poor remainder. We have, on the contrary, good hope that speedily and with small trouble, and withal without any encroachment on the rights of private property, or disregard of just claims, we shall get secured to us upon a firm and indestructible basis the open and common lands which are at present the ornament and health of the Metropolis, to be preserved and enjoyed by the general public for ever for the purposes of exercise and recreation.

LINCOLN'S INN, September, 1866.





II.

ESSAY

ON

THE LEGAL AND HISTORICAL ASPECTS

OF THE

QUESTION AS TO THE

PRESERVATION OF COMMONS

IN THE

NEIGHBOURHOOD OF THE METROPOLIS.

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. . . . "incubasque gaze,  
Ut magnus draco quem canunt poete  
Custodem Scythici fuisse luci."

MARTIAL, 12, 53.

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By WILLIAM PHIPSON BEALE, Esq.,  
LINCOLN'S INN.



## ESSAY II.

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SOME seventy years ago there was much complaint that the large open waste tracts of land in thinly peopled districts could not be turned to account for the general good because they were the property of nobody, or because rights possessed by individuals therein were qualified by rights in others which prevented an inclosure. Hence the legislation known as the Inclosure Acts, under which immense spaces have been devoted to cultivation, to the considerable augmentation of the public prosperity, and to the great profit of lords of the manors in which these open wastes were situated. But this process has by degrees come to operate injuriously to the public in some cases. Near large towns the open wastes serve a valuable purpose for public recreation, and the legislation which promised advantage in one direction appears to pinch in another. We are told that it is not right to take a step backwards. "If we want playgrounds we must pay for them," is the language now held, and it has been gravely proposed that large funds should be raised in all haste to save some of our commons from being swallowed up by inclosure and devoted to the use of the builder. The inconsistency between the old and the new doctrine requires some explanation. Why may we not stop by legislation that which we set going by legislation? Partly, it seems, because it would work unequally as between lords who have been allowed to improve and those who would be prevented, an irregularity which some of the latter class of lords of the manor do not hesitate to call "confiscation." But inequality is not necessarily injustice where the public interest is the motive both for allowing and preventing the profits which the lords derive from inclosure. Partly also because the rights of the lord are strongest at law, he has a right to call the interests acquired by all others than a few tenants encroachments upon his posses-

sions, which the Legislature is only doing its duty to "rectify." Hence the difficulty of checking without injustice the operation of inclosure by the aid of existing or of future enactments. Open commons and village greens have a great many admirers, but few protectors. A pecuniary interest in the so-called improvement of waste lands biasses those who have the chief voice in controlling inclosure; and if one whose affections are more disinterested ventures to interfere, his chivalry may prove expensive—as chivalry often does—for want of a *locus standi*. It is vain to refer to the glories of picnics or of village cricket matches, to assert the right of the village donkeys and geese to feed in fraternity, of village kittens to be drowned in the immemorial pond; in short, to prove with poetical conclusiveness that an inclosure is "a shame." We are told shortly and concisely that those who have real rights are not of the same opinion, that sentimentality is all on the side of those who enjoy a furtive usufruct in open land which in no wise belongs to them, and that the Acts of Parliament under which inclosure can be effected have duly provided for all the real existing rights and interest in the wastes. It is true that these Acts were intended to provide for all rights in the wastes according to legal demarcation, even for rights which the law recognises as mere custom; but it is still open to us to doubt whether all such rights are in fact protected by the Acts, and even to ask whether the legal definitions of such rights were the proper limits for the scope of the Inclosure Acts. If we are to be satisfied by the existence of an Act of Parliament, it must not be merely shown that the Act has taken away no right which a man had before and could legally have asserted. Acts of Parliament have often and may still for the public benefit extend or diminish the rights in or power over lands attached by the Common Law to various estates. An enactment to be conclusive must be shown to have done all which was within its scope for the public benefit in the particular matter. Where, as in the case of Inclosure Acts, machinery is created for compensating interests of various legal definitions and stability, it is no reason for giving a greater advantage to one estate that the law *calls it* "paramount in its origin," or for passing by another interest because the law does not recognise it. Undoubtedly such an

Act of Parliament should respect the rights of individuals by the Common Law; the best guide to the value of a right while undisturbed is its legal strength. But legal strength may be a bare legal right, unexercisable except in particular contingencies, or may be an unquestioned power to interfere; and when an Act of Parliament provides the power to interfere with all alike, this difference should be respected in the valuation. Thus in the case of a common where a lord, his tenants, and a "public" have all *in fact* enjoyment, the lord may be unable to inclose against his tenants on account of a custom for them to take estovers; and the unlikelihood of his ever getting further enjoyment of the land would perhaps restrain his interference with the public, and be as good as an interest in them. We do not mean to lay it down that Acts of Parliament should give to such contingencies as this the value of a real interest, but we do think that where such contingencies may and do happen, and operate for the public benefit, no facilities should be given for defeating them; that all help given to those interested in inclosing waste lands should be with proof of contemplated cultivation for the public benefit; and that all benefits which the public lose should be properly weighed on the other side. For this reason we have begun by referring to the inconclusiveness for legislative purposes of the mere legal classification of the estates and interest that may be owned in open waste lands. The distinction between things themselves and the interpretation of them suggested by their names is always difficult to draw, and in order to fathom the signification of the estates attached by the Common Law to lords and commoners we must first attempt to show how the different interests in commons arose, which were subsequently described at law by means of such "estates."

The historical evidence from early times is confined nearly exclusively to the relations between the commoners themselves, and between the different villis and their legal magistrates; in more recent times it extends only to relations between commoners and the feudal owners. The rights of the public appear to have been seldom the subject of dispute, and may be called permissive, if the expression is understood as implying that they were permitted because no one originally

had an interest or claimed a right to interfere with them, and not as admitting that there was some conscious superior right which permitted the public to acquire against it. The rights of the public are thus intimately mixed up with the question as between lord and tenants or commoners. If the actual enjoyment by the latter *allowed* of a user by the public, it accounts for the origin of such user, and in the same measure as the claims of tenants and commoners assumed a definite legal form, so the rights of the public were reduced within similar legal definitions. We are using the term "public" as applying to all those whose rights or benefit in a common are not affected by a legal conception of "commoner;" there is some inaccuracy in our present use of the word, as rights are not recognised at law as being in the public at large, but this is a matter to be referred to hereafter. In any attempt, then, to comprehend the historical growth and establishment of commoners' rights and public user of open wastes, the lords and commoners must engage the greater part of our attention, bearing in mind what indication there may be of a general right to appropriate for the public benefit whatever was not subject to their claims, and observing how far this residue was by different steps appropriated, and in what position the public (still using the word public to designate all such as have some enjoyment but are not commoners) are now left. It is of course the consideration of the interests of such a public that for legislative purposes chiefly engages us. We have been told lately on good legal authority that the poor man is a mere trespasser on these open spaces, dependent on the will and pleasure of some lord for his footing there. With the help of the possible distinction above hinted at, between the *legal* position and the actual state of rights and requirements for *legislative* purposes, and with the aid of what records we can find of the early rise and enjoyment of waste lands, it may be useful to examine how far we can now with justice legislate to prevent our commons from being liable to be snatched from us at the convenience or need of a lord of the manor.

To whom do our commons belong? We must go back into early history to see when, if at all, they became the property of one individual.

The Norman invasion of England has held nearly the same position in the popular history of English institutions as the flood used to do in palæontology. The, so to speak, antediluvian customs and traditions of the English were too generally regarded as mere curiosities, and not as a fundamental formation in the strata of English institutions. They were looked upon as fossils incorporated with the drift of the feudal epoch which immediately underlies the formation of our English legislation. The earlier English regal and social institutions are often used for etymological or interesting illustrations; but in spite of the labours of our many eminent antiquarians, they are seldom grasped as being really an integral part of our national jurisprudence; and the feudal remains, undoubtedly sufficient for law as it now exists, have been taken to be equally conclusive for history in support of legal dicta.

Thus a well-known assertion of our English law-books is, that commons and wastes came into existence after an universal acceptance of feudal tenures in Norman times, and after the estate of the lord had been universally recognised as an absolute ownership of the soil. It is quite unnecessary to deny that such an origin of some commons is within the bounds of possibility. The existence of customs established by *user* since the time of legal memory, show how very few of the existing rights of common in England such an origin will suffice to explain. Even if there was a period before the time of Richard I. (the received limit of legal memory) when such an absolute ownership was really or generally asserted, the period must have been ridiculously short for the creation of new manors, with new waste and common lands, and the acquisition by tenants of diversified interests in the enjoyment of such commons and wastes.

The conditions under which commons have been in fact held by the lords since the time of legal memory, though inconsistent with Norman origin, may fairly illustrate the terms, from the lord's point of view, on which the open uncultivated lands originally came within the grasp of feudal rulers. We find the nature of such terms yet traceable in the customs which now affect a great part of the wastes still remaining. "Customs," for instance, to dig turf and gravel, to take estovers, and even

to use the common for sports, have penetrated to the present time; and the lord has been held to have no right to interfere with the common to their prejudice. Claims of this kind, dating from legal memory, coupled with the fact that Acts of Parliament have from the earliest times been apparently required to give the lord *any* power to inclose the wastes, even subject to his tenants' rights, are *prima facie* evidence that such lands were of ancient right more fully enjoyed by the tenant than at present, and were subject in the lord's hands to all the reasonable advantages which the community could derive from them.

We do not complain that the law, without evidence of the fact, has placed nearly all rights and interests in waste lands on the footing of grants from a lord. Such fictions are necessary, as our law is constituted, in dealing with landed interests; and it does not follow, from an historical inaccuracy, that a wrong is done—"Semper in fictione juris subsistit æquitas;"—and the Common Law has sufficient machinery, in the stability and significance given to *reasonable* customs and privileges, to represent the rights of every lord and tenant accurately. Our lawyers in using the term "grant," in obedience to the legal definition of a right over a common, do not necessarily commit themselves to an opinion whether the grant represents a "user" or a gift, created under Saxon or Norman tenures; as lawyers, they merely use the term as the form in which the law takes cognizance of the existing right. Lord Cranworth, in a recent celebrated case\* (which, however, referred only to copyholders), in discussing the reasonableness of a custom to get minerals, says that everything was in the competency of the lord to grant, and that unreasonableness may show that it only originated in indulgence, not in a right conferred. With such a definition of what the law *may* understand as the subject of the original grant, we cannot see that the legal fiction, that all common-rights did originate in grants, whether historically true or not, need work any harm to commoners' rights in our law-courts.

But when a legal maxim is quoted, unrestrained by its real significance, in the courts,—when the conjectures by which Coke, Blackstone, or Spelman indicated an historical origin for

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\* *Marquis of Salisbury v. Gladstone*, 9 H. L. C.



it, in accordance with their notion of feudal times, are assumed, without further inquiry, to be history,—and when the combined information is recorded as proving the whole origin and scope of an Englishman's rights in his open commons and village greens, and as containing the only principle on which the Legislature may deal with a lord of the manor in the public behalf, historical inaccuracy is not so innocuous. The law treats rights of common as “carved out” of the lord's possession; but as long as this view is admitted for legal purposes, the law itself compels no particular opinion as to why it was “carved out,” or whether the “carving” was a matter of common right or of clemency. The old adulatory commentaries on the laws, in making history to fit the law, have however expressed very strong opinions on the subject; and political historians, whose theories required such corroboration, have vied with them in deriving all popular rights from the clemency and bounty of a king and nobles, a clemency and bounty which menial ingratitude had dared to call a right:—“À les en croire,” says M. Guizot of such historians, “après la conquête toute l'ancienne population fut dépossédée et reduite en servitude. Les vainqueurs se partagèrent tout le territoire, tous les habitants, et demeurèrent seuls propriétaires et libres. Chacun d'eux s'établit dans ses domaines au milieu des ses nouveaux sujets, et ils se lièrent les uns avec les autres par un système qui prit le nom de régime féodal. A coup sûr rien n'est plus faux q'une telle hypothèse.”

In considering the origin and history of rights in land, especially if we would interpret the interferences which the law tolerates as “customs,” we must not start with laying down tenures as we find them written of in the 16th century; the only conception of landed interest we can attribute to primitive times is a right to enjoy. Land, apart from any advantage out of it, could not be originally the subject of a right. We shall try to trace the growth and modification of tenure of common lands from this conception. We will not speculate about an original time when lands were all held in common. Equality is an obvious starting point for the historian of early tenures, as well as for the poet of early simplicity,—

"A time there was, 'ere England's griefs began,  
When every rood of ground maintained its man."

*The Deserted Village.*

It is quite clear, that between such a time as that and the appearance of a community in possession of any kind of political constitution, there must be a series of changes caused by the acquisition of wealth and power by individuals, and of established rights by the community to regulate and maintain such acquisitions; in fact, a series of constitutions, which however would be inappreciable,—would be barbarism,—to a citizen of a more advanced state. Hence we find both Cæsar and Tacitus saying of the Germans, that their lands were all held in common,<sup>b</sup> which we must not understand in a literal sense, for Cæsar, who is most definite on the subject—"neque quisquam agri modum certum aut fines habet"—distinctly mentions the direction and control which the "principes" and "magistratus" had over the occupation and enjoyment of land. Tacitus couples with the community of enjoyment the frequent change of locality and the superabundance of land. Both historians are frequently quoted to show the existence of this early community of enjoyment, both only seem to show that such community is the necessary conception of such primitive enjoyment.

A family would perhaps at first occupy lands at their pleasure; they would plough a portion, and their cattle would roam at large in neighbouring unoccupied ground. As the family grew into a tribe, either by internal multiplication or by union with neighbours for protection against common foes, more land would be required to be taken from the wastes for tillage. Hence the right of *assart*, i. e. ploughing up of common land for *necessary* purposes, would have a very early origin. Of course, as long as there was abundance of spare land for pasture this could hardly be called a right, for there was practically nobody against whom the right could be claimed. But as the practice extended, and the *ad libitum* appropriation of land became inconvenient, the control of the privilege of membership of the community and the limitation of the powers of individual members would follow.

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<sup>b</sup> See *post* as to the supposition that Tacitus referred to Lammas land or stinted pasture.

In this manner an organisation would spring up on a principle of districts of territorial possession.

It is such a district as this which constituted the "mark" of the ancient German nations—we call them German because it is the term most readily understood to include a great branch of the Aryan family, extending from Scandinavia to Lombardy, whose institutions were within historical times identical in these respects. The term "mark" is known to all our readers to mean boundary, and will be readily comprehended as a term for district. *Piers Plowman* has the word strictly in the sense of "country,"—

" All that marche he tîrned  
To Crist and to Cristendom."

And the antiquity of its use, in precisely the same sense, we see from *Ulfilas*, *Matth.* viii. 34, "*hîndar markos ize*,"—out of their coasts. The untilled ground is called in early German writers "the wood," an appellation which some pastures long retained in this country. Such "marks," whether consisting of a primitive district, or formed by the union of two or more districts, may have existed long before the enjoyment of land on such terms came to bear any resemblance to what we call possession. But when the right to increase tillage was restricted, though ever so slightly, the difference in capacity and requirements between different individuals or different families would instantly begin to define the rights to land. That freehold possessions, not on terms of equality, but in proportion to power and dignity, would ensue needs no explanation; and the differences in degree of power, dignity, and requirements among these war-like tribes were capable of any extreme. The acquisition of coveted spoil, and of slaves and dependants who had to be maintained, would give at once occasion and means for transfer of land, and would necessitate some kind of tenancy to a lord, or enjoyment of the soil subject to the will of another man.

The protection of the "*mearc lond*" or waste land round these "marks" or district communities, was a matter of great consequence in early times. There is an enactment in the laws of King *Ina* of the West Saxons, which allows the slaying of a stranger "for a thief" if he comes through the wood without

blowing his horn; and many laws show that the control of these boundaries always belonged to the mearc-mote or judicial court of the district. These courts, which are probably the origin of the court-leet (see Appendix A.), were presided over by a freeholder, probably in the first simple communities the most potent of the marksmen, afterwards, when the district had become part of a state, a nobleman or a legal officer, a thane or ealdorman. The identity of this local government with the corporate government of boroughs, though not bearing on our subject, is worth a passing notice. The town, "by," or settlement, was no more than the municipal organisation of every community, though only in the case of the larger conglomerations of brick and mortar is the municipal principle conserved under that name. We learn from Madox that "a town not incorporated might be a community having perpetual succession as well as a corporate town;" and the use of the word "by-laws" (town-laws) is also a slight indication of the change which the conception of a "town" has undergone.

Just as the first primitive marks may be supposed to have formed together to constitute a larger mark with a "mearc-mote," so the larger marks united together to form a gau (*e. g.* Linlithgow), or scir (shire) with a "scirgemote." The jurisdiction of the scirgemote, however, probably did not absorb the rights of any individual mark, except as far as regarded the mark as a member of the "scire." In these larger tracts would be included great spaces of public ground, either mearc-lond or simple waste, all of which were subject to use for certain purposes and under certain restrictions; we will say, subject to certain *rights*, if we may do so without being understood to mean more than the authority by which such use and restrictions were created or controlled. A rough outline of the origin and nature of some of such *rights*, those which concerned the individual district to which the untilled land originally belonged, suggests itself at once from the above conception of a primitive commonwealth formed on a nucleus of settlers. Property meant land appropriated for cultivation; there was enough pasture land for all, and no necessity to carve out districts to individuals, and though the requirements of each would no doubt be in proportion to the extent of his cultivated property, any re-

*restrictions* on the amount of enjoyment that might be had in the open pasture land was a matter of subsequent regulation. These restrictions, at first watched over by the freeholders and their courts, and subsequently under a more complete organisation, with the supervision of an ealdorman, would gradually become important. But as, until comparatively recent times the proportion of arable land could always be profitably increased, all early regulations would be based on the conception that the pasture land must minister to the wants of *all*. No property in an open waste for pasturing purposes could be supposed<sup>c</sup> until so much land had been cultivated as to render the common lands insufficient, and the expedient of turning private land into pasture in some measure adopted.

Many German and some French writers have seen in the "mark" organisation and tenure, the origin, or at least the prototype, of modern common-rights. Their views or supposed views have been attacked by others much in the style of M. Warnkoenig,<sup>d</sup> who brings a mass of quotations proving, what nobody doubts, the existence of a feudal "lord of the land." Among other things the definition of *approvement in vasto terre domini* from the glossary of Du Cange, whose information, we are told, came from reliable (*glaubwürdigen*) documents, is tendered in evidence. This is a fair instance of the way in which innocent and faithful legal authorities are twisted by means of the legal expressions which they rightly use into partnership with fallacious historians. An essay by M. Tropolong<sup>e</sup> is also referred to as furnishing convincing arguments against Pardessus, who is particularized as one champion of the common-rights of the ancient municipal organization. But this essay, so far from contradicting anything advanced by Pardessus, is actually relied on by him (*Loi Salique*, p. 545) as conveying his views. If there were not so much pelting with texts<sup>f</sup>

<sup>c</sup> German antiquarians distinctly assert that no property in a waste was recognised: "Niemand hat in dem Gericht einen eignen Wald."—Grimm, 'Deutsche Rechtsalterthümer.'

<sup>d</sup> 'Geschichte der Rechts-Quellen und des Privat-Rechts.'

<sup>e</sup> 'Revue de Législation et de Jurisprudence.' Wolowsky, October, 1834.

<sup>f</sup> Pardessus refers to an edict of Chilperic I., dated A.D. 574, which his opponent rightly calls weak basis. The fragment is given in Pertz's 'Monumenta.' The sum total of the proof it affords seems to be that regulations for cultivation of the waste—the "folcland"—were made by edict.

the real question would not perhaps be much disputed. It is not the real contention of Proudhon (however violent his language), of Pardessus, or of any other author to whom we need attach weight, that commons are traceable back to the state of the mark; but they show the existence of these old commons against other writers who assert that commons had only a feudal creation.

We are not concerned merely with what the rights in a common are called, but with what they practically are, and may therefore surely begin by forming a conception of the earliest form in which they could have existed. We may take the mark organization and build thereupon, giving due weight, of course, to subsequent events, but not obliterating the past on the authority of subsequent dicta.

When a combination of such districts as we have spoken of became a state or commonwealth, the more general interests of the public placed other *rights* over these lands in the hands of those who watched over public interests in war, religion, or economy. The control by a state of the appropriation of surplus lands was capable of becoming a useful power. Lands were only allowed to be taken subject to services and on conditions for public ends, and the right to enjoy was occasionally made dependent on the capability of the owner to fulfil the state requirements. Hence the distinction between the "bocland" and the "folcland" of the English. Bocland belonged absolutely to, and was cultivated by, an owner as his freehold; folcland was that which the owner was allowed to have by the state. According to the stringency or leniency of the terms on which such allowances were made, the one tenure might of course assimilate to, or diverge from, the other indefinitely, but the great distinction remained. The bocland tenure was antecedent to the formation of the state which created the folcland tenure. The folcland before appropriation was, no doubt, included in the class of lands before referred to, in which common rights were enjoyed, and was primarily identical with the residue of open wastes first appropriated by settlers, yet after the formation of a state the distribution of these lands did not necessarily put the grantee in the position of a holder of bocland. The land could be granted on conditional tenure and

still retained its appellation of "folcland." In fact "bocland" and "folcland" became merely the names of different tenures, the former was the old freehold tenure, the latter could be converted into bocland or given on such other tenures as the requirements of the State indicated. The folcland has been generally treated as a surplus which had not been yet divided out to freeholders, and *therefore* belonging to the State as an owner;<sup>s</sup> but it must be recollected that land never was originally divided out to freeholders by a government, and that the State itself was but the aggregate of the different communities. The folcland therefore at first could only belong to the State in the sense of being available for the wants of the commonwealth.

The rise of a race of nobles is but the necessary consequence of the increase of wealth in the early community and the dependence for the accomplishment of some object of internal administration, or for organisation in war, upon the more powerful (see App. B.) From the nobles emergencies produce a king. The notion of a king as distinct from the leading man, or as a greater prince than the most successful earl for the time being, was, we believe, long foreign to the Saxons, and even to the English. Beda says that they originally had no kings, and, what comes to the same thing, the 'English Chronicle' tells us of so many kings at once that none of them can have had what we should call a right to the title. The wills of men styling themselves Kings of Kent, confirmed by other contemporary Kings of Kent, are still preserved. The Heptarchy was a stage in the transition from this plurality of kings. Whether there were monarchs properly so called or not, there were seven districts sufficiently organised under separate leaders to establish themselves as kingdoms in the history of that time. The gradual disappearance of the divided power and assumption of the regal power into one man's hands in or about the time of Egberht was but a consequence of the competition.

The king then was at first like the earl or thane, a freeholder; but it is clear that, as his wants were greater, the same causes which made him king would entitle him to more land than

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<sup>s</sup> This is the view taken in an interesting pamphlet by Mr. Ibbetson, published in 1778.

other freemen, and probably to freeholds in many different districts. His existence began and was maintained by the necessity of a military organisation, and the duty of assistance in war, at least in defence, was imposed on all members of the community from the earliest times. Hence he was king of the freeholders independently of their tenure; he was entitled to a certain portion of the revenues of every mark or district; the distribution of the "folcland" in return for pledges of military services was in his competency, and lands which became forfeit to the State came thus into his hands to be employed in this essential administration. How far this could go on as a mere trust need not be commented on; revenues and patronage were at least as powerful in those times as they are now.

The grants of folcland were naturally made among the king's military officers or *comites*. Tacitus speaks of service in the *comitatus* as the employment of the noble youth of the nation or tribe. The *comites* were the king's men, and not free like the freeholder or the thane; but as population and civilization brought about the means of warfare, and furnished profitable subjects for aggression, the estate became one more enviable than that of the free man. Thus a set of nobles by service sprang up, and from such a source came the filibustering lords of the Franks, the Teutons, and the Norsemen, of whose deeds we have so many legends. The strength of the tie of fealty which bound the knights to their chief is known to all who have read of the Nibelungen of Ruoland, or of Earl Sigurd; and if the records of freebooting chivalry among our own people are fewer, it is to be presumed that there were counter attractions of prosperity at home, and not that the spirit was wanting.

We have not asserted and do not mean to assert that such a growth of tenure and rights as we have described actually took place with all its steps in this country, still less that a band of warlike freebooters according to the models we find in legend sprang up within our shores. It is with similar institutions as organised for the *defence* of society, or for aggression in the *public* behalf, that we have to do in English history. We have no means of saying exactly what phases the conception or functions of the mark, the gau, the ealdormen, the king and the noble went through in this country, but in whatever forms



they were received and established here, those forms were the result of the previous gradual formation of society among the German tribes, and bore the same signification and value as if they had so grown out of primitive communities on English ground.

In England, then, there was the freehold tenure of bocland, and the freeman or thane who held land thus owed no fealty to a lord; he could make a will or alienate at pleasure. His interest in the waste or common lands was exactly the same possessory interest which a tenant in common with no possibility of alienation might have, subject, as to mearc-land and unenfranchised folcland, to the claims enforced by the district court (*i. e.* the tenants in common themselves and whatever special power the ealdorman may have acquired), and as to the folcland, to the powers of disposing of it and regulating it for the public good, which the king wielded. The tenants of folcland, on the other hand, held under the king by virtue of the oath of fealty, which bound them to certain services. This tenure under the king was originally for public benefit and in no way necessarily rested on a previous ownership in the king. Beda, in his letter to Egbyhrt, laments the absorption of folcland by monasteries on the ground that it left no lands out of which those who had deserved well of the State could be rewarded: "Quod enim turpe est dicere tot sub nomine monasteriorum loca hi qui monachicæ vitæ prorsus sunt expertes in suam ditionem acceperunt, sicut ipsi melius nostis, ut omnino desit locus ubi filii nobilium aut emeritorum militum possessionem accipere possint, ideo vacantes et sine conjugio," &c. The tenant of folcland, as his tenancy was originally supposed to be conferred for the public welfare, and to be conditional on competency for certain duties, could not alienate or devise his property without the king's consent. (See Appendix C.)

That the lord or the king may subsequently have assumed with impunity a wider control over the folclands or wastes than we have yet indicated we do not dispute, but that a territorial possession in a lord was *antecedent* to the rights of the freeholders or tenants in any ancient common-land, we hold to be historically a fiction. As to the supposition that events took place after the Norman Conquest by which these rights were all given up and

that something else was acquired (by *custom*!) we shall speak presently. We have some instances in 'Domesday Book' of common-land belonging to nobody, *i. e.* having no lord who had or claimed possession subject to the rights. "In Hund de Colenes est quedum pastura communis omnibus hominibus de Hundred." (*Domesday Book*, County Suffolk). Apparently no mere arrangement, such as stinted pasture.

In order to understand the records (see Appendix D.) which we find of dealings with open pasture land, the jurisdiction of the Hundred Courts must also be borne in mind. The division of the land and population into hundreds and tithings is ascribed by Blackstone, on the slight authority of a monkish chronicler, Ingulf, and thereupon generally attributed, to King Alfred. We have no doubt that the institution was of much greater antiquity; still, it was clearly an organisation subsequent to the formation of a state out of the original settlements. As the Hundred Courts gained the control and jurisdiction over districts, the ealdormen or nobles who presided over them acquired the power of inflicting fines and the control of the revenues to satisfy the claims of the Crown and the expenses of internal administration. This power would be exercised, in the case of common-lands, in a stewardship of the folcland and waste on behalf of the State and in the incidental prevention by fines of unwarranted encroachment or of undue use for pasture. The control thus gained was probably the nearest approach to a seignior which existed previously to the growth of the modern manor. It is obvious that its tendency would be to assimilate constantly to that type. A power similar in kind to this we have already attributed to the old mark courts and their presiding ealdormen, and though the jurisdiction of these courts would be but limited in comparison to the Hundred Court, the power of the magistrate in the smaller community would have a greater chance of approximating to that of a modern baron in the court-leet. The grants of private judicial privileges, "*sac and soc*"<sup>h</sup> as they were termed, to the greater landholders were very frequent. The necessity for such a grant in order to confer the privileges over lands which were granted "with the woods, with the meadows, &c.," in general words is

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<sup>h</sup> *Sac* comprehended criminal and other fines. *Soc* denoted liberties.

very significant, taking into consideration the probable amount of interest which the general words passed in woods and lands devoted to pasture. In a charter as late as the reign of William the Conqueror, published by Mr. Thorpe, the monarch grants "sac and soc" to the monks of St. John at Beverley over all the lands they held. These independent jurisdictions did not of course create districts independent of the hundreds, the Hundred Courts had more comprehensive functions not resting on tenures. Still in the hundreds we may conclude that their control over open lands by the absorption of or identity with mark districts necessarily in some cases identified these lands with the hundred. The instance given from 'Domesday Book' is one example, and in the 'Placita de quo warranto, temp. Edward I.' "the men who hold hundreds laund" are spoken of. In corroboration of the obvious conclusion that land once considered the common property of the hundred is here referred to, we have the definition in Coke upon Littleton of "laund or lound, a plaine between woods."

The existence of a class of ealdormen, whether old thanes or nobles by service, exercising considerable power over districts, a power more or less approximating to the control ordinarily exercised by a modern lord of lands, will thus be readily comprehended. The early English laws are full of provisions for adjustment of claims or infliction of punishments in the lord's court (or even by the lord, if there were a lord who had jurisdiction over the particular spot,) or in the court of hundreds ealdor according to the circumstances of the case. Occasionally the lord having the jurisdiction is called "landrica," or landlord. In the laws of Edgar the penalties for making a purchase without proper witnesses (provisions in restraint of cattle stealing) are laid down. The transgressor has certain forms to go through to justify his possession of a live beast, "and if he does not this within five days let it be told to the elders of his district, and without responsibility (*wite*) to them or their herdsman let him lose his beast who bought it, and let the landrica have half and the hundred half." All this is to take place in the common pasture (*Gemænre læswe*). Again, by an enactment in Canute's laws, one who violates his oath incurs penalty of death to the king, or to the "landrica" if there is one. The lord was a *steward* of

lands for purposes of the law. The early confusion of "lagmann" "man of the law," with the title of noble, apparent from many sources, is admirably instanced by Professor Munch from the annals of the four masters. When Mac Harold went on one of his conquering expeditions, it is said that the "lagmanns" of the Isles went along with him, and "lagmann" is used simply as the peculiar title of some of the chieftains. The terms earl and count were in this country titles of nobility to which territorial power was afterwards attached, but on the mother soil, where the title and the power grew hand in hand, we find the term graf, ge-reeve, which we have simply as the title of a legal officer (reeve sheriff).<sup>1</sup> The duke, synonymous with the heretog, was a military dignitary.

Sir Henry Spelman, whose great researches and learning were devoted to harmonizing existing English law with the legal conception of Norman feudality, and from whom Blackstone takes a great part of his antiquarian matter, states in his 'Glossary' that he knows not what "manors" were in Saxon times. We apprehend that the difficulty is more in the complication caused by the diversity of their origin than from any want of evidence of such institutions. The right of a noble or ealdorman over his district was easily replaced by, if it did not quite grow into, the manorial form. The original distinction between a thane, who was a great freehold landowner and lord of the marches, and the lord, who was a grantee of large tracts of folcland with rights of sac and soc, would tend constantly to wear away. Both might have tenants in bocland tenure under their jurisdiction, villeins and bordars might be settled on the lands of both, and the cattle of all, without distinction of tenure, would depasture the wastes in common. But did the two classes of lords even exist separately? In most cases a powerful lord would have lands in both tenures, and thus the only difference would be in the number and rights of the freeholders whose common lands the lord and his court controlled, a difference which still exists. And whatever distinction may have existed between the status of the freeholder

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<sup>1</sup> "Tho' was yong Gamelin crowned king of the outlaws,  
And among them walkid a while under the wood slaws,  
The false knight his brother was shire-gerewe and sire,  
And let his brother be endite for hate and for ire."

*Fourteenth century, quoted in Grimm:*

who was an original freeman and that of one who held by fealty to his lord, we cannot see that a different conception or limitation of reciprocal rights over common-lands can have originated or been afterwards implied in the two cases. The tenure (if the word is applicable) of a pre-Norman lordship was practically identical, at least in outward form, with that of a manor; though far more extended powers may have been acquired by Norman lords for themselves and their successors.

As to the status of the copyholder of the manor, we have neither occasion nor means of ascribing a particular date to his origin. It is clear that a tenure at the will of a lord, involving fines and heriots, was perfectly consistent at a very early period of the municipal organisation. Whether in point of fact the incidents of modern copyhold tenure ever really attached to public land granted *ex officio* by the lord, or whether all grants of copyhold were of land previously recognised as the lord's own, though a most interesting question, is not an essential point in our present subject. Copyholders' common-rights have to be alleged and proved at law as customs, and have certain favour as "reasonable;" beyond this, the copyholder is only as one of the public. Ancient villeins and bordars may have thought their footing in the waste more analogous to that of freeholders; but the Norman form of tenure, "at the will of the lord," whether effecting a real change or not, has at all events by its legal formula silenced any claim the copyholders, *as such*, may have had to have the waste respected.

Mr. Kemble is our best guide in inquiring into the institutions of our English forefathers; his opinion, therefore, we feel bound to refer to (but not absolutely to endorse) on this subject of pre-Norman feudality. In speaking of the consequence of the establishment and growth of the class of nobles by service, he concludes as follows:—"As the royal power steadily advanced by his assistance, and the old national nobility of birth, as well as the old landed freeman, sank into a lower rank, the gesid (*i.e.* comes) found himself rising in power and consideration proportioned to that of his chief. The offices which had passed from the election of the freeman to the gift of the Crown were now conferred upon him, and the ealdorman, duke, gerefæ, judge, and even the bishop, were at length selected from

the ranks of the *comitatus* . . . . and the alods being finally surrendered to be taken back as *beneficia* under mediate lords, the foundations of the royal feudal system were securely lain on every side." Though generally prolific in authorities, he gives us no evidence of actual surrenders of lands and re-grants in tenure under a lord. But such occurrences for the causes he indicates we are quite willing to assume. Military service, in one form or other, was a necessity of *any* holding of property, a "feud" was common to all who had lands to protect; the laws of Edward the Confessor command readiness for service "according to the feuds." The change from enlistment under an ealdorman as ealdorman and enlistment under an ealdorman as king's lieutenant was probably a sacrifice of cherished privilege rather than a change of tenure. And again, even if the surrender and grant were more than a form of oath,<sup>k</sup> we cannot see how a possessor of lands *and common-rights* could, by a surrender and re-grant, leave in the lord anything more than a part of, or any interest in, such lands *and common-rights*. If an absolute freehold of the lands which were the subject of the common-rights were not previously in the lord or the tenant, it could not be created by such a process. What might be created, and what probably *was* created, if not by these early homages and fealties, at all events by the subsequent homages and fealties to Norman rulers, was a power in the lord of taking profits from the tenant for purposes over which the tenant had surrendered his control. The landed interests were held conditionally on the performance of duties imposed by the oath, were liable to forfeiture on non-performance of those duties, and on the other hand the legal *interests* of the lord were controlled by and limited to their objects as completely as the legal *estate* of a modern mortgagee. Where a freehold existed, the lord's control over it would be consistent with the legal assumption that the paramount freehold was in him; but in the case of common-lands, where the rights which came into his hands were unconnected with any notion of freehold in the soil, the expres-

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<sup>k</sup> "Our English ancestors probably meant no more than to oblige themselves (in respect of their lands) to maintain the king's titles and territories with equal vigour and fealty as if they had received their lands from his bounty upon these express conditions."—*Blackstone*, 2, 51.

sion, "the lord's land," could not be interpreted with the wide signification which it has been subsequently allowed to convey. Whenever the lord's exactions took the form of interference, as by an owner of the soil, with the tenants' common-lands, rights so gained over manorial wastes were but customs which the lord established *in opposition to* and in abatement of the tenants' original interests. The interests of tenant and public were acquired before the time of the lord, and if any of them were in fact ever surrendered and re-granted, they were not capable of destruction by being re-granted by him with the incident of homage. We greatly regret that the law has found it more convenient to call the lord's so-acquired perquisites rights instead of customs. Some of his interests, however, and many wider and older interests in others, it has designated *customs*, and has attached the condition to them that they must not go to the destruction of the wastes.

We have thus far dealt with the tenure or enjoyment of common and waste land in early times, with the intention of pointing out as clearly as was in our power how it probably arose and existed before the Conquest, and how far it was susceptible of modification into modern forms. It will have been pretty obvious that we do not agree with the historical part of our ancient law-books in ascribing to feudality, much less to the Norman Conquest, the effect of utterly changing the terms of landed possession. We will try to make out what were the terms on which common-lands were enjoyed in Norman times, and to see on what evidence the assumption rests that commonable rights were conferred or first permitted by indulgent Norman lords.

Readers of Hallam and Blackstone will see no novelty in the statement that some kind of feudal tenures existed in England before the Norman Conquest; but their existence is only spoken of as an interesting discovery; it is not allowed to interfere with the custom of ascribing love of freedom and equality to the so-called Anglo-Saxon, and oppression and feudality to the Norman. The systems of the two races are popularly contrasted, yet we know that they were but two tribes of the same race, and we may learn without much trouble that their institutions were of similar construction. Savigny, Grimm, and Maurer, and many authors of equal authority, have placed it beyond reasonable doubt that

a system containing the germ both of the free and the feudal tenures was common to the Norseman, the Teuton, the Frank, and all their Gothic kindred. Where can Norman feudality have come from except from the same causes which engendered the system among the Saxons? A great difference in degree might exist as the necessity for a warlike organisation was greater, and bearing this in mind we may admit the identity of the institution without prejudice to the reality of the change and burthen cast upon England by the Conquest. Hengist's *comitatus* was a troop of settlers, probably a swarm from a superfluous population in search of lands to cultivate and enjoy. Five hundred years later the Norman Conqueror came with *comites*, who were more in quest of fame than in absolute want of lands, and whose notions of territorial acquisition and power had grown, with the rapid growth of military rank, to an extent unknown to the military or freehold lords of the comparatively peaceful island. The battle of Hastings swept away a great proportion of the English nobility, and great tracts of land already occupied by tenants fell to the share of the Norman lords. These tenancies, again, were many of them rendered vacant by the battle, and probably many more by sheer force and oppression, and all these would be filled with Norman retainers. But there appears to have been nothing like a re-allotment of the lands: 'Domesday Book' contains clear proof that the greater number of small tenants were left in their holdings. There is no evidence that the parcelling out of lands went further than this substitution of new lords and tenants, where lands by lapse or forfeiture were considered to be in the Conqueror's hands; and though the disposition to stricter feudal organisation would be spread over the country by this infusion of new proprietors, yet this is no ground for such a supposition as is involved in the currently asserted *introduction* of feudal tenures.

Sir Francis Palgrave is very decided on the subject:—"With respect to England, with which we are more immediately concerned, we believe that, previous to the Conquest, all land imposed upon the owner the duty of contributing to the defence of the State according to its value. As the Conqueror found the land, so he gave it, and, after a good deal of uncertainty, over-exactions on the part of the Crown, demanding more than



was due, and refusals on the part of the landholders to give what was really due, the territorial system settled after the accession of the House of Plantagenet into a more definite form."

But our old law-books give their authority for the assumed change of tenures; the passage has been often quoted, but we give it in the original English:—"Sithan he ferde abutan swa þæt he com to Lam-mæssan to Searebyrig, and þær him comon to his witan" (nobles or counsellors), "and ealle þa land-sittende men þe ahtes" (ought) "wæron ofer eall Engle land, wæron þæs maunes men, þe hi wæron, and ealle hi bugon to him, and weron his men, him hold-adas" (oaths) "sworon, þæt hi woldon ongean eall odre men him holde" (faithful) "beon."—'English Chronicle,' A.D. 1085. In modern words—"Thence he came to Sarum, and thither all his court came, and all the great landed folk of all England, and became his men and took the oath of allegiance." There does not appear to have been the slightest hesitation on the part of our law commentators in taking the expression "all the landowners" in a literally exhaustive sense. A similar interpretation of such terms as "everybody," "all the world," as they occur in the 'Times,' would be effective in a history of the 19th century.

The same event is also recorded (some call it "confirmed") by Florence of Worcester, who certainly, in some places, took his information from the 'Chronicle;' here he tells us no more than that all the knights did homage to the king. Oaths of this kind are mentioned in the 'Chronicle' before (A.D. 921, for instance, when King Edward regained East Anglia from the Danes), though they are narrated by the historian with less stress, probably because on the occasion of earlier conquests oaths were of less historical consequence. We take it to require no explanation that a conqueror should impose an oath, and we venture to think that there is more ground for assuming an *universal* acceptance of new tenures of land from this record than a future historian would have for calling the swearing in of the rifle-corps of 1860 a general renunciation of civil rights if he wanted to account for a period of military rule.

Some passages are also often quoted from the laws of William the Conqueror applying to the organising of a feudal militia, which are no more than stringent enforcements and elabo-

ration of a system which is prescribed in Edward the Confessor's laws.

Such passages from the 'Chronicle' and from the statutes are about all the evidence from historical sources that we get in order to prove the historical truth of the great event by which it is assumed that the feudal tenures which exist in the jurists' mind were created. Blackstone, who quite realised the way in which feudal tenures had gradually superseded the old allodial and free holdings in France, appears to have thought that the assumed rapid conversion of English tenures required some explanation by the side of the more natural course of change which Montesquieu indicates; he therefore sees in these citations from the old chronicles and laws a proof that the English, *having the recent example of the French nation before their eyes*, nationally and freely adopted the feudal system (i.e. Blackstone's feudal system) by a general assembly of the whole realm. How the example came before their eyes, and how they could thus considerably interpret it, does not appear. "The only difference," he continues, "between this change of tenures in France and in England was, that the former was effected gradually by the consent of private persons, the latter was done at once all over England by the common consent of the nation."

We submit that there is as little evidence of such an occurrence as there is necessity for supposing the change it involves, or probability that any nation ever accepted such a change in such a manner. If instances of the difficulty of such a wholesale conversion is not superfluous, we may find them where the conquerors have had more advantages than a military triumph, and more time to effect a change than from A.D. 1066 to A.D. 1086, and where the old definitions of landed right have notwithstanding stood their ground. The Irish tenants and the Indian ryots afford us examples, in the face of which we can hardly think, with Blackstone and Spelman, that tenures were suddenly remodelled, and prepared for the manipulations of the law with such extreme facility.

There is nothing shown, therefore, to warrant the assumption that the tenures by which land was enjoyed took a new and so-called strictly feudal *origin* in Norman times, and we are not

justified in confining the interpretation of subsequent enactments and events to the limits created by such a supposition.

We have the record of much litigation on the subject of rights in commons and woods as early as the reign of King John. We give the memorandum of one case just by way of example. There are similar cases from the same reign of such disputed rights in the counties of Worcester, Hertford, Warwick, Lincoln, and Nottingham which may be consulted.

“ Warwick, Michaelmas, 8 John.

“ Rathus, the son of Wigain, against whom the Abbot of Reading brought an assize of novel disseisin of his common of pasture in Sherele, came and acknowledged the disseisin, and rendered him his commons, and pleaded guilty (*‘ posuit se in misericordiam* ), &c. And it was made known that the same abbot claims no common in 8 acres of tilled land (*‘ de assarto ’*), nor in the wood which is called le Frith, and contains 12 acres according to perches of wood land (*‘ secundum perticam bosci ’*).”

From this case (in the absence of information whether “ Rathus ” was lord of the manor of the “ assart ” land) and from the other cases in this reign, we are unable to gather much about the extent of the rights in question, but they tend to show that the rights were even so soon after the Conquest established on a basis with which the “ judicatores,” to whom they were referred, could deal. Nothing is said that shows that the question of grant or indulgence on the part of the lord formed part of the issue. The cases we have referred to are printed in the *‘ Abbreviatio Placitorum. ’* In one of these cases, between the Abbot of Rufford and certain claimants of common rights, the abbot’s plea was that Robert of Cundy and Gilbert of Gant divided, so that neither had common in the other’s lands, and that the king gave the monastery certain of the lands. Now, Sir William Dugdale gives a grant from Gilbert of Gant to the monks of Rufford, and a confirmation of that grant by the Crown in the time of Henry II.; the claim, then, obviously is that of tenants of Robert of Cundy, tenants whose rights even before the time of the grant, and not more than 100 years after the Domesday survey, had been made the subject of a special agreement between the lords, and who had yet kept their claim alive. The abbot also pleaded that the

rights had been settled in a former case between him and the tenants. These tenants at least had not had cause, either from the behaviour of their lords or by the decisions of the law, to regard their rights as an indulgence or a grant. Rights thus claimed in the lands of a neighbouring lord, and after such substantial interferences, could not be regarded either as appendant or appurtenant in the sense to which legal definitions have limited those terms.

As early as the twentieth year of the reign of King Henry III. we find the reciprocal rights of lords and tenants in common and waste lands the subject of the interference of the Legislature. The statute of Merton, passed in that year, is still sometimes quoted to justify inclosures of commons after the inclosure has been made, although, for practical purposes, it is all but obsolete. It is necessary to explain what is the real bearing of a law the repeal of which was only last year proposed by a Committee of the House of Commons, and which still, after 600 years, and after centuries of suspended animation, threatens our remaining fragments of open land. That statute recites—"Because many great men of England (which have infeoffed knights and their freeholders of small tenements in their great manors) have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, whereas the same feoffees have sufficient pasture, as much as belongeth to their tenements;" and then proceeds to enact "That whenever such feoffees do bring an assise of *novel disseisin* for their common of pasture, and it is acknowledged before the justices that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenement unto the pasture, then let them be contented therewith, and they on whom it was complained shall go quit," &c. Now, looking at these words in themselves, they seem to establish a good deal as to what were then the Common Law rights of lord and tenant in what are called the lords' "residue of their manors." The lords complained that they *could not* make their profit out of that residue, and if they tried, the tenants appear to have been able to bring an action against them grounded on their right of common of pasture, although the lord had not interfered with the commons which were necessary to the enjoyment

of their tenements. Whatever may have been the basis on which this necessary amount was calculated, the lord appears to have been as little able to restrict his tenant to this necessary amount and to dispose of the surplus as the old ealdorman was to allow "assart" of the public land without consent of his court. And if these rights were urged against the lords, on the principle that commons in the *whole* waste had been universally granted by them, it follows that they had been universally held to have re-granted to the tenants their full rights over the common, and had practically left themselves with only these same limited powers.

But it is asserted that this statute only confirms the Common Law, *i. e.* that we must not take the statute to be meant to regulate rights, but to declare the real state of rights that then existed. Without very strong external grounds for so interpreting this enactment, this would not suggest itself. There is not one allusion in the Act to show that it is allowing what was theretofore done "rightly," and preventing what was done wrongly. The lords either complain of the absence of a privilege or of an interference with a power, and it must have been something very potent which interfered with a feudal lord. Why should they complain of absence of the privilege if they had it already? And, if they meant that a power had been interfered with, the Act seems to admit the previous legality of the interference.

There is no doubt ground enough for our law-courts to assume that this statute was only declaratory of the Common Law, for the Common Law may have been subsequently *assumed* for legal purposes to be identical with what this statute enacts. We have already stated that we do not wish to breathe one word against such assumptions, as long as they are only a part of the framework of the law, and used and modified by lawyers in their proper signification. But when the assertion is applied to history, and the statute is said *in fact* to define the then rights of lord and tenant, we feel no hesitation in rejecting all but *historical* grounds on which the dictum rests. The statement has, we believe, been universally taken from Lord Coke's 'Institutes' (2. 474); he there clearly lays it down in so many words that the statute gives no more than the lord might do by virtue

of the Common Law, and he refers to two cases, both previous to the statute of Merton, in support of the statement. These two cases are the only authorities, beyond the *ipse dixit* of lawyers who lived at least 350 years after the Parliament of Merton, that we can find, and we give them in full. If they are not found to contain positive evidence of approvement being allowed by Common Law, which can be opposed to the *primâ facie* positive evidence against that supposition which the statute affords, we submit that the assertion, that the statute of Merton was only declaratory of the Common Law, can have no historical foundation.

" Anno 6 Henry III.

" Trinity, Stafforde.

" L'assise veñ reč si I disseise T. de coĩa pasture q̃  
The assize comes to try if I disseised T. of the common of pasture  
partinet ad librum tenemētū suum in D., et ipse veñ et conced'  
which belongs to his free tenement in D., and he himself comes and acknowledges  
ass' et jurat) diō qđ idem I assertavit quandā partē bosci  
the assize; and the jury say that the said I had tilled up a certain part of  
ubi ipe solz hāre corām suam circit̃ ii acrē et illas feč  
the wood where he used to have his common about 2 acres, and had inclosed the  
includ' sed alibi potest habere coiām ubique in bosco quantum  
same; but elsewhere he can have common anywhere in the wood as much  
pertinet ad tenementum suum, etc.: post veñ T. et retraxit se," &c.  
as belongs to his tenement, &c.: afterwards T. came and withdrew, &c.

The jury found that the claimant had suffered no substantial damage and he discontinued the suit. If we suppose that the bare right, independently of the actual damage, was part of the claim, the cause of action must have ignored the supposed state of the Common Law. The case is certainly not inconsistent with the supposition that the lord could by law inclose if he left sufficient for the tenant, but it is strictly negative evidence on this point, it does not show that he did or could exercise such a right. We have remarked that there was always a system for regulating the tenants' common-rights; the expression "as much as belongs to his freehold" is therefore no argument that the remainder was in the lord.

The other case is as follows:—

"Anno 12 Hy. III.

"Tr. Ebor.

"W. soñ est ad warf Abbat de F. lx equas et viii stalones in

W. is summoned to warrant the Abbot of F. for 60 mares and 8 stallions

foresta de L. quā tenet et de eo tenere clamat et und' cartam  
in the forest of L., which the latter holds and claims to hold of him by his

habet unde idē abbas profert cartam et hoc testat qd' W et  
charter, when the said abbot shows the charter, and it witnesses that W. and

hered' sui debeāt warf imparpet eidem abbati et suō suis  
his heirs are bound to warrant for ever to the abbot and his successors

pasturam ubiq' in L. etc.; et unde queritur contra illas cartas  
pasture everywhere in L. &c.; and it is complained that contrary to those

et cont' cartam suam de confirmato fecit idem W. quandam  
charters, and contrary to his charter of confirmation, the said W. had made a

clausuram ad spāo duarū leucarū per quod stalones et equas  
certain inclosure of the space of two "leagues," through which the stallions and

eorum non poss' venire ad aquam ubi ad equar' soleb' nec  
mares could not come to the water where they were wont to graze,

venire poss' ad fald' suas nisi mag. pena et W. ven' et cogn'  
and could not come to their folds but with great trouble; and W. comes and owns

cartas illas et dic' quod fecit quandā clausurā decem acr'  
those charters, and says that he made a certain inclosure of ten acres

terre sed illud clausū non est ad nocumentū staloniū  
of land; but that inclosure is no injury to the stallions of the

ipsius abbatis quia bene poss' libere et sine impedimento  
abbot, because they can still freely and without hindrance go to

ire ad aquam et redire et petit judiō si poss' ad comōdum  
the water and return; and he asks judgment if he could for his own

suū clausū facere in pastura illa ex qua pastur' illa adeo  
purposes make an inclosure in that pasture, because that pasture is still

larga est quod idem abbas habere potuit coiām et pasturam  
large enough that the said abbot could have common and pasture

ad suffiō ad plures equas et stalionum quam ibi habet et  
sufficient for more mares and stallions than he has there; and (says)

qd' post cartā suam no' fecit plus cland' nisi pred' x acr et  
that after his charter he made no more inclosure than the said 10 acres, and

<sup>1</sup> *Leuga* is literally "league." There appears, however, to have been a peculiar English *leuga*, consisting of about 480 perches (Du Cange). Perhaps the wood measure was larger, as otherwise this would only give six acres.

de hoc ponit se sup' patriā; et quia W. cogn' cartā suā as to this he puts himself on the country; and because W. owned his charter, et continetur in cartis qd' abbas hēat ubique pasturam and it was contained in the charters that the abbot should have pasture in foresta ideo consid' est qd' W. non potuit includ' sine everywhere in the forest, therefore it is adjudged that W. could not inclose without assensu abbatis et quod foresta illa sit in eod' statu the assent of the abbot, and that the forest should be in the same state in quo fuit prius," etc.  
as it was formerly, &c.

The case is one of warranty. It merely shows that the lord was bound by his warranty to maintain the abbot in what had been granted to him. Lord Coke seems to use this case to prove that the Common Law did not allow approvement against a *grant* of pasture, and to justify his assertion in the same sentence that it did allow it in case of common appendant or appurtenant. This case, like the former one, seems to us only to support his dictum if we *assume* that the acts of the lord were done under cover of the Common Law; we cannot find this in the simple record.

There is a note in Coke upon Littleton (365 a) from which we gather that a warranty by the lord to maintain his feoffee in whatever he enfeoffed him was created by homage ancestral, and probably originally by simple homage. A charter was but *evidence* of the enfeoffment grant or warranty, whatever may have been its subject. In every case, therefore, where one entitled to pasture or other profits of common in large open spaces was reinstated in his *full* rights by a feudal lord, he had, or once had, the same power to assert those rights against the lord which the abbot in this case with the help of his charter vindicated. Both these cases, then, support the preamble of the statute of Merton, that the lords wanted to take the "residue of their manors" and that the tenants would not let them; they certainly do not show that the former wanted to exercise a right which the latter had theretofore been strong enough to resist by wrong. We see, therefore, no evidence from which we can argue for historical purposes that the lord had a right to approve against the tenants before the statute of Merton, and the statute *per se* is *primâ facie* evidence that he had not.



But apart from this question, the Act only provides that such an assize of novel disseisin for common of pasture shall not operate to interfere with the lord where the tenants have a sufficiency for their tenements left; it in no way enacts or implies that where that sufficiency would be left, *nothing* is to interfere with the inclosure. Practically by barring the only right which was in most commons sufficiently valuable as a cause of action, it was in effect what it has been called, an Act enabling the lord to approve on leaving sufficient pasture for his tenants. Without going into the question whether rights to get minerals, turf, or gorse, &c., from manorial wastes were in point of fact grants from the lord or old rights in the tenant, whether they be customs or *profits à prendre*, whatever their origin and nature, it is clear this statute gave the lord no right to interfere with them by approving. Indeed, as far as the Act is concerned, there is nothing to show why the mere *old right to have the common open* should not prevail against the lord if such right were of value and enforceable in the Common Law Courts. The assertion of such an indefinite custom, even if it were valuable as a legal right, would probably be justly called ridiculous; we only say that there appears to be no power to disregard it given by the statute of Merton. We must look to subsequent enactments and decisions to ascertain by what *right* a lord can approve against a tenant who says "I claim an interest in having that common open;" and we are not long in finding that it was at least an established fact and presumed by the Legislature that he might do so, though perhaps not directly authorised.

The statute of Westminster the second, passed in the thirteenth year of King Edward I., extends the operation of the statute of Merton to commons where the rights are between neighbours, and independent of the relation of lord and tenant. The recital in this Act is, that "in a statute made at Merton it was *granted (concessum est)* that lords of wastes, woods, and pastures might approve the said wastes, woods, and pastures, notwithstanding the contradiction of their tenants, so that the tenants had sufficient pasture to their tenements." This shows clearly that the statute of Henry III. was held to *enable* the lord to approve, subject only to the pasturage rights. Even if the use of the term "*granted*" does not amount to direct evi-

dence of the contrary, the Act certainly contains nothing to suggest that the right existed by the Common Law, a right which, if it existed and had been confirmed by statute against tenants, would have been perfectly obvious against neighbours. The mere existence of these claims in the wastes of another lord in such early times, and the fact that they were strong enough to require a special enactment, suggests that originally they were not controlled by a feudal lord, that the enjoyment in common existed before his right began. Probably this Act is the last historical trace of the claims to enjoy common pastures as being still in fact "meare-land."

It may be objected that we have looked only at evidence of restriction on the lord in dealing with his wastes, and not at the numerous instances of free grants by lords to vassals and monasteries of commons of pasture in their woods, and, which is more significant, of open spaces on which to build. We should be more surprised not to find such grants than to find them. The exercise of such power to grant could, under the circumstances for which we have been contending, only be illegal where it interfered with rights which the tenants *claimed* in such lands. Where no such opposition is mentioned in the grant it certainly does not show that the lord proceeded in spite of his tenants. That by such a grant he destroyed the possibility of subsequent claims in that land by the tenants is true; but it does not follow that the tenants could not by right have made subsequent claims, and did not, knowingly or unknowingly, lose a right, or what their requirements might subsequently have raised to a right, by their acquiescence. We have shown that from the earliest times of granting folcland to be held under the king there would be a constantly increasing tendency to forget the public nature of the surplus that was not granted and not the subject of pasture, to attribute an absolute power over it to a lord, a power nearly tantamount to freehold, and so recognised probably even long before the time of the Normans. Again, we have observed that after very primitive times pasture-land might be enjoyed on the same terms as arable land, that it could be the subject of a grant and of individual possession. Under this state of things it is obvious that the lord had a certain power of granting away pastures or woods, and that subject or not subject to

rights of common. But neither the possession of that power, nor the instances we have of its exercise, appear to us to show that the tenants could not before the statute of Merton have interfered if the lord's proceeding had pinched them, much less that all they did not positively enjoy in the commonable land was (otherwise than by a pure legal fiction) *vested* in the lord.

There are frequent instances of grants of approved land in the 'Monasticon.' Almost immediately after the statute of Merton the manor of Rotherham with the approvments were granted to the abbey of Rufford. We find one grant, that of Thomas Chaworth to the prior of Beauchief, which conveys the hamlet of Greenhill with his own approvments and *those of his tenants*. It is worth mentioning that the word "approvement" does not seem to occur before the statute of Merton.

The enactments on the subject of waste and common lands subsequent to the statutes above referred to have all been based upon public utility. With the exception of one Act, not relevant to our present subject, in the reign of Edward VI. they have simply dealt with methods on which the various claims in such lands can be valued in order to inclose them for agriculture. They have attempted to deal with the reciprocal rights as they exist, not to amplify or define them. From the year 1795 to 1800 the subject occupied great attention on account of the then scarcity of corn, and the most sanguine schemes were put forward for inclosing the whole waste land in the kingdom, which was estimated capable of producing an annual gain to the country of nearly twenty millions. The Inclosure Acts now in force have proceeded on the principle of the Acts then passed, and are directed to the utilization of all waste land, whether manorial or otherwise.

As matters of history we have done with the growth and conditions of manorial wastes and common-rights as soon as we arrive at the period of our legal authorities. These rights, as they existed in fact, were, as we have seen, inconsistent with the complete feudal system conceived by lawyers. The law defined them as things of the past without reference to their vitality for the public good. After this period the only changes that could take place in the legal tenure or enjoyment of commonable lands, were such as our present law admits of by the latitude it allows to

prescription and analogous custom. The creation of new manors, which we fancy was practically impossible long before, was rendered even theoretically impossible by the statute of *Quia Emptores*, 18 Edward I. c. 1. As to the rights affecting existing manorial and other waste lands, the footing on which the law has placed all the rights of commoners gives effect only to such changes as arise from the interpretation of customs, dating, or presumed to date, from the time of legal memory. The limit of legal memory is fixed, as before noticed, at the accession of Richard I.; everything subsequent adheres to the legal conception of the state of the tenures and existing interests at that time. It is true that, in order to avoid the doubt that arises in certain cases, various periods of user of a benefit which may be claimed by custom are allowed by Common Law to give rise to the presumption that the enjoyment dates from the time of legal memory; and by statute, continuance of enjoyment of certain easements and profits for sixty, forty, thirty, or even twenty years is permitted to establish a right which the adverse party is not allowed to contest on the ground of an origin anterior to the statutory period. But these are only considerations which concern individual cases of common-rights in detail; all rights so established must be consistent with, if not supposed to be identical with, the state of the tenures and interests as held to exist from time immemorial. The effect of Common Law doctrines and decisions may have been to cause considerable change in the practical position of lord, tenant, and commoner; and in order to see what has now become of the rights of the commoner as against his feudal lord, our course is to take the *possible* extent of common-rights to be as we have indicated it in early Norman times, and to attempt to give a proper value to the effect of the treatment they have met with in the courts of law.

If we have hitherto dealt with the relative rights of the lord, the tenant, and the public, without much regard to our great legal authorities, the apparent disrespect is owing more to a desire to clear away the false historical signification which popularly attaches to their dicta than to any inclination to impeach the importance, or the truth, as legal formulæ, of the dicta themselves. It is true that for legal purposes the freehold of

land must be in somebody, whether the land be the private property of an individual, the subject of a settlement, a manorial common, or a public playground. We have shown that in the case of commons, no deduction follows that the bare legal freehold ever in fact conferred paramount rights over the land; how far the law attributes to the freeholder the same position as if he had such paramount rights, and how far he is entitled to immunity for all the present and future emoluments of the rights thus attributed, are further questions.

The answer to the first of these questions, the measure of the privileges accorded, depends upon the interpretations of the Common Law. We do not intend to do more here than to state the effect of a few of the reported cases on the different descriptions of common; a very little will suffice to show how a few simple principles have been applied to assure to every man his own in the enjoyment, *once acquired*, of common lands. Our difficulty is more with enjoyments that may in future arise from open lands, in seeing whether they have been tacitly irrevocably disposed of by the operations of our law-courts, or whether they are still available for all who might have taken advantage from them in earlier times.

The answer to the second is more difficult; it is a matter of public interest, the subject of Acts of Parliament, and is capable of extension or limitation by future enactments for the public benefit. Parliament gave the means for inclosure by which lords are practically able to make profits out of their wastes; it cannot be denied that Parliament may restrict them. The difficulties of doing justice are easily defined. If acquisition by so-called owners of the fee be restricted, it seems somewhat hard to them that rights, by which other lords have been allowed to benefit, should be fruitless to them in the future: yet on the other hand it cannot be just that an ever-increasing public should lose, for the advantage of an hereditary lordship, the larger benefits which, as in the case of commons near large towns, may be only developed in the future.<sup>m</sup> The tenants and the public want Acts of Parliament which will preserve *all* existing rights in their full extent, including all benefits, perhaps

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<sup>m</sup> See *post* as to commons near large towns.

not yet appreciated; which may arise from having open common lands. The lords call this "confiscation" of their legal rights; they say that the true conclusion from the legal definitions is that the right of future extension of the enjoyment exists only for them: that others have inclosed and built upon portions of the wastes by virtue of having the freehold, and subject only to certain legally circumscribed rights in the commoners, and that they ought to be in no worse position now. The solution is difficult and must depend much on the circumstance of each separate case.

If we can get a clear comprehension of the extent of the public rights, the public voice in Parliament can both make and use machinery for their defence. But such a comprehension involves the great difficulty of giving a value to public interests which the law has *not* established and has negatived by implication, and which the Legislature has not negatived and only by implication recognised.

First, as to the rights as defined by law. The aid of "customs" has been called in to give effect to many of these rights without injuring the completeness of the theories adopted by law-courts. The probable identity of so-called "customs" when a system of law has been introduced by conquerors with the former laws (or call them "usages") of the conquered, is worth a passing observation. This seems to have been hinted at by Lord Mansfield in *Clarkson v. Woodhouse* (reported in a note to *Bateson v. Green*, 5 T. R. 412.) What is once established law is seldom obliterated. England has administered law according to the prescriptions or codes of Manu,<sup>a</sup> of Mahomet,<sup>a</sup> of St. Louis,<sup>o</sup> the law of Holland,<sup>p</sup> and Spain,<sup>q</sup> at different times in her colonies; Jersey and Man preserved their ancient legal forms, while usage under the name of Irish tenant-right has, though unrecognised, asserted itself with tolerable success. Gavelkind and borough English have preserved themselves as "customs" in derogation of what is established as the law of England. The establishment of a custom may in most cases be called the assertion of a conscious right; its limitations depend upon the strength of counter claims at the time of establishment.

<sup>a</sup> India.<sup>o</sup> Canada.<sup>p</sup> The Cape, Ceylon.<sup>q</sup> Trinidad.

The rights of which we are treating may be roughly divided into the rights of commoners and the rights of the public.\* The former are of the nature of absolute profits from the land, the latter are interests in having the land left open, in passing over and being upon it, and in not allowing profits to be taken therefrom which curtail the public user. The term commoners' rights is perhaps not correctly applied to benefits other than pasture, but for our present purpose we class *profits à prendre* and easements with some of the commoners' rights which are enjoyed under analogous legal definitions.

The common enjoyed by the freeholders of a manor in the wastes is held to be a Common Law right in them, or rather an incident attached by Common Law to their estate; and therefore they may claim it by virtue of their tenure, and have not to allege or prove any user or custom in order to justify their right to it. This kind of common is probably the direct descendant of the ancient joint enjoyment of pasture-lands, the nature of which we have tried to illustrate by referring to the old mearc-londs and other open wastes. The courts have now limited these Common Law rights to a definite amount of pasture, though they probably allow some of the other original perquisites under the name of customs. There are dicta of lawyers which would confine the common appendant to a right to turn on to the waste as many beasts as are necessary to plough and manure the tenant's lands in the manor; but it is now held that each freeholder has a right to put as many beasts on the common as the produce of his lands in the same manor is capable of maintaining in the winter, and this whether such lands be in fact arable or pasture land.\* This measure of the right in respect of cattle "*levant and couchant*," as it is called, is obviously identical with the requirements in respect of pasture in primitive society. The Common Law right for every freehold tenant to have pasture in the waste in this proportion may by custom be extended

\* We still use the word public to comprehend cases where the rights belong to a class of people (such as the inhabitants of a particular place, &c.) irrespective of tenure or individual grant or prescription.

\* An exception is made where the land was anciently pasture. But where

land was anciently pasture the antiquity is only a matter of memory; the land may have been once arable, and no common-rights ever claimed when converted, or it may be a subsequent permitted acquisition of a portion of the pasture-land of the manor.

to pasture during the whole year or confined to a time certain, and custom may also annex to this kind of common profits in the shape of estovers, turbary, and all other such emoluments which may be enjoyed by one in the land of another. These latter customs rest upon a different footing, and require proof of legal custom in each individual case, but in the view the law takes of the nature of common appendant it seems to recognise an *estate* possessed by the tenant in the common lands. For instance, a tenant may maintain an action against any one<sup>\*</sup> surcharging the common without averring that sufficiency of pasture is not left for himself (*Hobson v. Todd*, 4 T. R. 71; *Greenhow v. Ilstley Willea*, 619). The lord may justify the surcharging of his grantee under the statute of Merton by showing that a sufficiency is left, but if the tenant shows the fact of insufficiency it is to prove damage and not to give a right of action. Again, where a lord claimed larger rights against his tenants than the powers strictly given by the statute of Merton, his possession of the freehold was not allowed to avail him. (*Bateson v. Green*, 5 T. R. 411, where a right of a lord to dig clay from the waste was held to be a custom, and not to be justified by the statute of Merton.) The copyholders of a manor have often *by custom* the same amount of pasture in the wastes, but in their case it must be alleged and proved strictly as a custom.

By reason of the same fundamental distinction, the common of the freeholder differs from that of the copyholder in not being liable to be lost by reason of non-user. Indeed all the privileges of a manor, as such, appear to be indestructible at Common Law: this seems to be established (in the case of the lord at least) in *Soane v. Ireland*, 10 East, 259, where the manor was extinct for want of freeholders, yet incidental manorial privileges of the lord remained.

The greater part of the commoners' rights other than those of the freeholder rest at law upon a presumed grant by the lord. The rights of copyholders to common in the wastes of a manor, the right to cut turf, to take gravel, sand, wood, furze, &c., for various purposes, all kind of such privileges appurtenant to hereditaments, and in gross, belonging to indi-

<sup>\*</sup> Against the lord himself he probably could not maintain such an action, though he might against the lord's grantee.



viduals, are upon this footing. The existence and extent of such rights of common are proved by evidence of grant or user, and are allowed at law upon such evidence, having regard to the *bonâ fide* nature of the claim and to the reasonableness as affecting the lords of the manor. With the help of the prescription acts and presumptions in aid of "time immemorial," there is therefore nothing to prevent the creation of such common-rights at the present day, and though the law assumes that all that is not taken is "left" in the lord, yet on the other hand all that the lord has not appropriated is still subject to a chance of appropriation by commoners. It is clear that this practically gives to a commoner a possibility of establishing at law anything which he has really once acquired, and has not by his neglect allowed the lord to take as his own, subject only to the consideration of reasonableness. A definition given above<sup>a</sup> from a recent case in the House of Lords of the effect of unreasonableness leaves us without fear of injustice being done on this ground, as to *existing* profits, but it should be borne in mind that the assumption of an original grant from the lord does not allow of any expression of rights unfelt in by-gone times, though now appreciated. Thus the privilege, now valuable, of living near an open space is clearly an unreasonable claim to establish by user against an innocent and unwilling grantor, and not being presumable as a grant, the law allows no way of claiming it. This observation may cause a smile, but it *is* often a privilege, and requires an Act of Parliament to destroy it; a right to protection for the privilege is not more ridiculous than the *right* claimed to destroy it. We are far from saying that, in the case last referred to, which dealt with the rights of copyholders, the definition as a grant was historically incorrect: it is a question which must remain in doubt how far copyholders' common-rights were or might be made co-extensive with those of freeholders. But if the dictum be taken to refer to all cases, and to lay down that "grantability" is a necessary condition, we submit that even its comprehensive terms may leave the door closed against some rights which should have an expression.

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<sup>a</sup> *Marquis of Salisbury v. Gladstone*, 9 H. L. C. per Lord Cranworth, "everything was in the competency of the lord | to grant—unreasonableness may show that it only originated in indulgence, not in a right conferred."

The courts of law have in general been generous towards the commoners. The case of *Duberly v. Page* (2 T. R. 391), may be taken as a fair example of a class of cases preserving in their full extent commoners' rights to turbary, estovers, and other perquisites from the wastes of a manor against the lord. These customs may be used to prevent the lord's so-called rights from being exercised in the curtailment of the waste. And though customs are allowed when for the benefit of the lord as well as for commoners, yet they have not been allowed to prevail where they conflicted with the commoners' rights. No custom is valid which could possibly effect the destruction of the whole common.

There is, however, one alleged custom of this tendency that appears not to be yet negatived by an express decision. It is asserted in some manors, but not upheld by legal opinion, that there is a custom for the lord of that manor to inclose the waste with the consent of the homage. The homage at the Customary Court are copyholders, and cannot bind the freeholders: the homages are ordinarily selected by the steward, and could not at any court equitably bind the remainder of the tenants for such a purpose; in fact, such a custom would be practically a custom for the lord to inclose the waste with so poor a restriction that it is obviously inconsistent with the cases which veto unrestricted inclosure.\*

But as common appurtenant, common in gross, easements, customs, and *profits à prendre*, may be gained by grant or user, so they are liable to be lost by non-user or abandonment. Just as user gives rise to a presumed grant, or, what is legally the same thing, presumed immemorial custom, so neglect or non-user may be legal evidence of abandonment. Abandonment seems to be equivalent to the permission of the establishment of a conflicting interest by other people: non-user is of course only negative until some one is in a position to interfere with the resumption of the user.†

There remains to be noticed a class of common-lands peculiar though simple in their nature—the so-called common *pur cause*

\* *Arlett v. Ellis*, 7 B. and C. 346.

† *Wilkes v. Broadbent*, 1 Wils, 63: "a lord cannot be judge in his own cause."

See *Moore v. Raicon*, 3 B. and C. 332, Sugden's 'Real Property,' Statutes,

and *Reg. v. Chorley* there quoted. Some obscurity is perhaps caused by the use of negative terms, "non-user does not destroy," &c.

*de vicinage* and a variously denominated enjoyment in common, on a kind of club principle, called in some places Lammas-lands. "Common pur cause de vicinage est lou les tenants de deux seigniors sont seisis de deux seignories dont l'un gist pres l'auter, et chescun de eux ont use de temps dont memorie ne courre de aver comon en auter ville ovesque tous beasts commonable. Mes l'un ne poit mitter ses avers" (beasts) "en le terre l'auter car la ceux de l'auter ville poient eux destraine damage feasant, ou aver action de trespasse mes ils eux mittera en lour camps demesne et si ils estray en les camps del auter ville ils doivent eux sufferer, et les inhabitants de l'un ville ne doivent mitter eins beasts tants comme ils voile, mes ayant regard al frank-tenement del inhabitants de l'auter, car auterment il ne serroit bone vicinity sur que tout depend."—*Terms de la ley*.

The cases referring to this kind of common are not very consistent, but luckily not very numerous or important. The established view seems to be as stated by Wray, C. J., in *Tyrringham's Case* (4 Rep.) that this kind of common only originated in the very equitable consideration that where there were two adjoining unfenced pastures the absence of a fence was an excuse for the natural trespassing of the cattle.\* At the same time it is decided to be in the nature of common appendant and can only be claimed for cattle *levant* and *couchant*. It was even once doubted whether this class of common can exist unless the land on both sides is subject to rights of pasture.

Common *pur cause de vicinage* can be put an end to by the act of inclosure, exercisable at will by the legal owners or owner of one or both of the contiguous lands. There appears to be no right in any one to profit by such pasture, but in order to destroy the immunity from trespass the inclosure must be complete (*Gullett v. Lopes*, 13 East, 348). And it seems that the law has held this characteristic of inclosibility to be a *custom*, which in *Hickman v. Thorne* (2 Mod. 105) is ingeniously reconciled with the apparently conflicting customs implied by calling this arrangement a common.

Lammas-lands, or yard-lands, as they are sometimes called,

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\* See also *Bromfield v. Kirber*, 11 Mod. 72, and *Prichard v. Powell*, 10 Q. B. 589, where this definition is supported.

among other appellations, are something of the same nature.\* They are where co-proprietors—or perhaps more properly adjoining owners—of land cultivate their plots in severalty during part of the year and enjoy the pasturage of the whole in common during the remainder. Sir Miles Corbet's case (7 Rep. 65 a) is on the subject of "shack," evidently a similar enjoyment of lands in common, and it is there identified in principle with common *pur cause de vicinage*. The power to inclose Lammas-lands at will has, however, been both asserted and doubted on good authority; it is the subject of the judgment in *Cheeseman v. Hardham*, 1 B. and Ald. 706, where the identity in this respect appears to be finally established between these lands and common *pur cause de vicinage*. In fact both these modes of enjoying land appear to be in origin rather matters of implied arrangement between landholders or commoners than a class of *public* open land. The law has classified them as commons, but from what we have seen of their legal nature, it is plain that there is no doubt as to the feasibility and fairness in inclosing any common so conditioned, and if the public has in solitary cases an interest in the open waste it must be on account of rights acquired from the mere fact of the land being left unfenced or unprotected against them. Whether, in cases where a public interest has assumed so strong a legal durability as to make an Act of Parliament necessary for an inclosure of such lands, the Act should be granted, depends partly on the circumstances of the case, partly on the general considerations of national interest. As will appear hereafter, Acts have been passed facilitating the inclosure of commons in which the commoners are owners of the land, as in these cases, and making provision for certain *public* wants.

The kind of interest in commons which we have already referred to as the rights of the public, rests at law upon a similar theory of an original presumed or presumable grant, as we have already noticed in speaking of common-rights; the public have at law no rights of common, but their interest in open lands is recognised under the name of custom. The limits of such

\* Tacitus, in the expression "*arva per annos mutant*," has been supposed to speak of something like Lammas-land. But he adds, "*et superest ager*," which does not look as if he referred to a principle of tenure.

legally established interests are more or less definite, accordingly as the actual user by a "public" was more or less capable of reduction to the legal formula of a profit carved out of the interest attributable to the lord. The incidents of creation and destructibility of these customs are the same as we have already attributed to commoners' custom. The only further question is raised by the consideration of unreasonableness involved by alleging a custom for the benefit of the public. Unless some limitation of "the public" be contained in the claim, such a custom would obviously tend to contradict the legal postulate that no custom can be good which can destroy a common as the lord's waste. Thus all the inhabitants of a village have been allowed a custom to dance or sport at all times of the year upon a certain close of the lord, "*et spoil son grass*," as the old case has it,—*Abbott v. Weekly*, 1 Levinz, 176 (A.D. 1667). But the law has consistently held that the custom must at least leave an appearance of something of his paramount right in the lord, and that such a custom for "*all men*," instead of "*all the inhabitants of a certain place*," would not be good—*Fitch v. Rawlings*, 2. H. Blackstone, 393; and Lord Eldon in the St. Andrew's Golf Case (2 Dow, 40), implies his doubts about a custom for "*all who choose*" to play at a game and prevent the land from being used beneficially to the owner.

The law has introduced another doctrine in order to reconcile the existence of customs for a public (such customs as affect village greens) with orthodox legal notions. There must be something, we are told, tantamount to a dedication to the public to create a *servitus spatiiandi*. If this dedication may be inferred just as another custom may be inferred we do not mind taking our privilege under this name. But if, as appears from Lord St. Leonards' judgment in *Dice v. Hay*, 1 McQueen, 305, it means that such a custom is not only bad if the public be unlimited, but absolutely requires *affirmative* proof of dedication to establish it even for a limited public, it seems to draw the restrictions tighter. From the reference, however, to village greens, a dedication seems to imply that the custom may go to countervail the conditions of non-destruction of the common which make a general public custom without dedication bad in law.

Some of such public rights are claimed in the nature of ease-

ments or rights necessary to the enjoyment of property or of other rights, and in these cases the thing claimed, being of a precise and limited nature, the right acquired is properly confined to the reasonable and legal extent of such a claim. *Blundell v. Caterall* (5 Barnewall and Alderson) is a good type of this, where it was held that the public right to bathe in the sea did not involve a legal right to the easement of a road for that purpose, where such an easement was annoying to adjoining resident landowners. On the other hand, where it is a question of an advantage not bounded by the consideration of its origin as an easement, the cases mentioned above, and a still older case (quoted in them and referring to the right of fishermen to dry nets on the sea-shore), seem to show that the only limit to those public rights is the question of reasonableness, qualified possibly by the doctrine of dedication.

But these customs or public rights in common-lands require attention chiefly in order to note the limit beyond which the law cannot go. As before stated, there is no difficulty with rights which are good as customs in law. The question to which we want to direct attention is as to those advantages connected with open commons not yet absolutely attributed as rights to anybody, which in the eye of the law are inconceivable as rights, being inconsistent with certain legal definitions, but which are cognizable by the Legislature as existing advantages, certainly not illegal where the law, without parliamentary aid, is powerless to destroy them. This part of the subject should perhaps more properly come after stating the effect of the Inclosure Acts, but concerns a kind of latent public right which it is not out of place to notice here. As a fact which we need not expatiate upon, open wastes serve a great purpose as hindrances to over-crowded building and as public recreation grounds, and still greater benefits may arise from their situation in increasing thickly populated districts. Now common-lands were always susceptible of use for recreation by such a public as the neighbourhood afforded. Whatever may have been the extent of the interest of that public in having the common open, whether a right in itself or the mere advantage that no one else had inconvenient rights, we cannot separate it in the nature and antiquity of its origin from the similar rights of common of

pasturage. It differs only in this, that, disregarded or not even conceived, it was a right, or rather a fact, which could in no way be affected by any prerogatives asserted by a feudal lord. Of course by the *exercise* of the lord's prerogatives the public could lose a great deal, but, on the other hand, by the *exercise* of interference with the lord others have got something—and in most cases so much that the lord cannot take the residue without an Act of Parliament. Whose is the residue? The lord's, it is said, because legally his. But if legally his, why is an Act necessary? Because the circumstances of the case generally prevent him. We cannot see in these circumstances anything less than a right in the public in its origin equal to, if not older than, that of the lord. Unless we presume that the lord acquired a right which was unknown before, unless common-rights were then measured not by the various profits the land afforded but by the dicta of the *subsequent* law-courts, what the lord acquired was simply a power over the lands subject to the then interests of the tenants and public. Whatever further title in analogy with a freeholder the lord now has, is acquired against the rights of the public, exactly in the same way as against the ancient commoners.

It may be said that a lord who might interfere and did not interfere surely did not lose his right, and that when from his non-interference a large and populous district had come within reach of his common, this had nothing to do with an ancient right in the public. But the ancient right was really shared between the lord, the tenants, and the public; each had power to extend according to their wants with the connivance of the others. Where commons existed near populous districts, the fact of the user as an open common was probably the one great reason why they remained in that state. Little boys may be turned off one part of a common, but if there be enough of them they will reappear in another. The public somehow or another has got the use of a common which the lord, from his legal position alone, cannot inclose, and there is no obvious injustice in the fact that the lord has lost his chance of further profit from that land as completely as the public would have done if he had inclosed it before they gained its use. The law chooses to deal with these rights on the supposition that they are all acquired

subject to the lord's rights, and there is no reason why, for the purposes for which the supposition is made, full justice should not be done on this basis. But we have no more grounds for inferring that the lord ever had or has anything more than he actually took or takes in the benefit of a common, than for attributing a physical sensation to a trustee through whom a legal estate passes by the statute of uses.

The Inclosure Acts have of course worked great changes in the relative position of the lord, his tenants and others, as regards commons, and in putting an end to the existence of many wastes, as ministering to public wants. We have rather frequently spoken of the lord's position without the aid of Acts of Parliament, as pointing to the extent of his *rights* against the public; but we must not be understood necessarily to imply that the Acts always gave him an *unjust* advantage. Of course Acts of the Legislature, *bonâ fide* enactments for the public benefit, may fairly operate to the especial advantage of individuals; and it is notorious that a special application to Parliament has hitherto been held necessary where a proposed inclosure might possibly be grievous. No great injustice can have been done yet; but recent events have opened our eyes to the fact that the machinery for the assertion of public interests in commons wants much more vigorous working, or else readjustment.

With the exception of an Act unimportant to us, passed in the reign of Edward VI., the first statute since the time of Edward I. directed at the inclosure of common-lands was in the twenty-ninth year of George II. Thereby and by an amendment passed soon afterwards owners of wastes were empowered, with consent of the major part of the commoners in those wastes, to inclose a certain portion *for planting*, and to apply the profits by agreement.

A more vigorous measure was passed in 13 George III., by which great facilities appear to be given for inclosing and regulating lands in the nature of Lammas-land or stinted pasture, and placing commons under the superintendence of a proper officer. With the exception of a clause giving a lord of the manor power, with consent of three-fourths of the commoners, to lease a twelfth part of the manorial waste, this Act seems to work no general modification of the Common Law.



About the year 1795 there was considerable agitation for inclosure and utilization of waste lands on account of the scarcity of corn. It was then put forward as a great national desideratum that *all* waste lands capable of cultivation should be inclosed, and an increase of national wealth equal to twenty millions per annum was calculated to be attainable by these means.

The result was a considerable increase in the granting of Acts for inclosure; up to the end of the last century about two thousand such Acts had been passed. In 1801 we find an Act passed containing clauses usually required in Inclosure Acts, and intended to aid the granting of such Acts. Some terms on which inclosure was usually allowed appear by this Act; but no principles are disclosed on which the public utility of the special Act was determined, or on which the commissioners weighed the relative claims.

The first Act which established as general law principles of this kind was 6 and 7 William IV. c. 115. This enactment does not apply to manorial wastes. It enabled two-thirds of the persons seised of or interested in possession of any rights of common or other rights in open and common lands for estates therein defined, to inclose the land and extinguish the rights of common. A provision was made for a previous public meeting of persons interested, but the definition of the estates which were to give a voice in the inclosure seems to allow no expression to other than the strict legal interests. One clause, however (sec. 55), expressly excepting open and common fields situated within certain distances of large towns from the operation of the Act, shows that the public interest in commons was already beginning to qualify the axiom that national interest and justice were all on the side of inclosure.

This Act provides that seven-eighths of the commoners may inclose without the intervention of commissioners. The general operation, however, of this and subsequent Acts is to confide the apportionment of the lands inclosed to commissioners. It is not necessary for us to say anything about the method the commissioners adopt (which is very fully explained in evidence given before a committee of the House), we are only concerned here with what they are commissioned to do, not how they do it.

The next enactment of importance begins to add considerations of a more public nature to the strictly legal valuation of rights under which commissioners would otherwise proceed.

The Act of 1845<sup>b</sup> providing a method for inclosure of all kinds of waste confides to commissioners the duty of judging of the expediency of inclosures, and the superintendence of the inclosure, according to the provisions of the Act, but enacts that wastes of manors, lands subject to rights of common exercised at all times of the year, and lands within certain distances of large towns, shall not be inclosed under its provisions without the previous consent of Parliament. No village greens are inclosible under this Act. There is also provision for attention to public interests made by the 34th section, which enacts that a public meeting of persons, interested which is to be called for the purposes of the Act, shall have power to devote part of the land for public purposes. These public purposes are enumerated in the section, and concern roads, drains, *profits à prendre*, and charities for the benefit of the neighbourhood, especially mentioning a recreation ground. The Act in fact gives a right, if not inconsistent with the provisional order of the commissioners, to devote part of the land to the satisfaction of customs, and operates probably in the case of some recreation grounds to legalize what could scarcely be legally enjoyed previously even as an immemorial custom. The consents required by this Act are, as before, two-thirds in value of the persons interested, with an especial provision that were the freemen, burgesses, or inhabitant householders of any city or town should be entitled to rights of common or other interest in the land, the commissioners shall not proceed until the consent of two-thirds in number of such interests are given. In the case of rights of this nature the Act provides for an allotment to trustees for the satisfaction of such rights.

The five enactments on the subject of inclosure which followed the Act we have just spoken of mainly carry out the spirit of the last enactments. They materially increase the facility for applications for inclosure, but on the whole do not require much notice for our present purposes, as the rights and

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<sup>b</sup> 8 and 9 Vic. c. 118.

safeguards of the public are not touched in principle. One provision,<sup>c</sup> however, which enacts that "all powers and authorities in anywise enabling the commissioners to complete proceedings under any Local Act of inclosure shall be applicable to proceedings commenced under the provisions of the Act 6 and 7 Wm. IV. c. 115" must be borne in mind. We have already mentioned that Act, and shall have occasion to refer to it again as having possibly a distinct operation from the other Acts.

The Act 15 and 16 Vic. c. 79 makes the important alteration that no inclosure shall thenceforth be made *by the Inclosure Commissioners* under the before-mentioned Act of 1845 and the Acts passed since that date without the previous authority of Parliament in each particular case. It will be seen that this does not necessarily affect inclosures under 6 and 7 Wm. IV. c. 115. This stipulation for parliamentary sanction is the last provision of the Legislature on this subject to which we need call especial attention. There have been three subsequent enactments of importance, providing among other things for protection of village greens from nuisances, and giving facilities for the working of minerals reserved to the lords of the manors; but we see nothing which further affects the preservation or destruction of common-rights.

We may now attempt to see the position in which, after all these enactments, those to whose requirements open commons and waste lands can minister stand at the present time. The lord of the manor is clearly entitled to what the waste in its natural state yields over and above the commonable produce. Such perquisites are timber and minerals, and the lord can only be restrained from taking them when the rights of others *in the surface* are injured by his act, and are asserted against him as indicated above. There is no reason to doubt that a lord took this kind of surplus chattel, or *profit à prendre* from the waste long before a "freehold" of the waste was ever thought of. But besides these, he has now got this legal "freehold;" he has got whatever benefit there may be in the dicta of the common lawyers that everything in the waste belongs to him, except what may be claimed against him under legally defined custom,

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<sup>c</sup> 12 and 13 Vic. c. 83, s. 4.

prescription, grant, or easement. Some lawyers go so far as to say that, as lord of the manor, he necessarily always was in fact thus entitled; but he is *not* entitled to have this implicitly believed and acted upon outside of a law-court. The tangible property which these Common Law attributes amount to is no more than co-extensive with the perquisites the lord may be actually deriving. The rest of his lordship, of his ownership, is nothing, *without extrinsic aid*, beyond a dignity or a bare trusteeship. Acts of Parliament have indeed provided such aid in the shape of machinery by which, on the occasion of inclosure, this fruitless part of his dignity is valued on the basis of Common Law fictions. On inclosure a great surplus profit is developed, and he takes this. Even if he can make out that in such an event the appropriation of this surplus is only analogous to some of his rights, the development of this profit by the Inclosure Act is no *right* in him; it is a largess. Still he manages to add the precedent of the large gains thus incidentally made by him to the titles and advantages which history and law have given him, and to make one prove the justice of the other to the confusion of opponents.

The tenants, on the other hand, have got their pasturage commons, their profits in the nature of customs, and the share on inclosure equivalent in value to such commons and customs as defined by law. They have also by sufficient combination the power to prevent an inclosure; and, finally, the safeguard that parliamentary sanction is required for any inclosure other than what the lord may make by the combined operation of the statutes of Merton and Westminster the second, if indeed these statutes still in any case avail him.

The public have the advantage of such customs as we have seen they can (as a legally limited public) establish at law. For this they have to proceed in legal terms, and against the lord. But elsewhere than in a law-court, to some extent in equity and surely in Parliament, they may fairly oppose the historical antiquity of their full rights to the origin of the lord's rights. There scarcely seems any more reason why the Courts of Equity should pronounce a custom to be bad, or a *de facto* user and enjoyment unenforceable because it clashes with what courts of law have given in name to a lord, than that they

should disregard the interest of any other *cestui qui use* in favour of the legal estate. It is, perhaps, not decided that a lord who, holding land as lord of a *common*, converts it to another purpose, is by the mere force of his legal position beyond the restraint of equity; but at present there has been little encouragement to tenants or the public from the courts. Though the position of the public is weak at law (everything being presumed against them) and far from strong in equity (nothing having been done for them), the parliamentary field remains in which they can assert their *de facto* and rightful position. They have already succeeded to some extent. Thus the possibility of extension of customs, and the non-interference in future with enjoyments not yet practically interfered with, have been somewhat protected by the prohibition against inconsiderate inclosures near large towns. It is true that this is now included in a general power of parliamentary veto, but the fact of its recognition as early as the Act of 1836 shows that it is a real consideration, even apart from the struggles recently made for restraint on inclosure in particular instances. Protection of village greens is expressly provided for, and the mutuality of the interests of the public and of the persons defined as "interested" in a common, gives some chance of saving a part of the land for public purposes. On the occasion of the inclosure of the manorial waste of Chigwell, in Essex, a space of only eight or ten acres was devoted to the public, and here the parliamentary power was asserted, the Legislature refusing its sanction unless a space of fifty acres were given for public purposes.

This sort of parliamentary interference is all that the public can in most cases get, and the extent to which Parliament will support a claim on behalf of the public on the occasion of an inclosure depends naturally on the importance of the right claimed. It is for the public itself to say what value it puts upon its playgrounds; it is no part of our present subject to aid or detract from the valuation, but to show how far such valuations may justly prevail against an Inclosure Bill based on smaller public advantages.

There are, as we have seen, important advantages available to the public from open commons in populous neighbourhoods which are not always adequately represented by an allotment.

Some of these consist in having the common open for future enjoyments of a more extended character, some in the difference between a wild open space enjoyed in partnership with cattle and furze-cutters, and an orderly playground exclusively devoted to the public. Advantages of this character cannot get a very forcible expression in Parliament for want of a sufficiently strong interest in individuals to oppose to the very strong pecuniary interest which others have in inclosure. Concentration is everything in such a case, and one man who means present profit and is armed with the ordinarily undisputed maxim that the soil is his, subject to rights which he will pay for, is too strong for a host who can gain little but future public interest, and who have to arrive at unanimity and work with all the weight of proof on their shoulders.

The hope of preservation therefore mainly depends upon the principle on which Parliament can fairly exercise the veto, upon what they ought to consider a sufficient reason for denying an inclosure. It is strange that such denial is so generally looked upon as a measure requiring justification. What the lord has by Common Law, and can *actually enjoy*, cannot rightly be taken from him; but what is merely a name in law, and can only be turned to profit by the permission of Parliament, does not appear to be on the same footing. Yet it is called a *right*. Where he is powerless to move by Common Law, the *right* appears to us to be only co-extensive with being called the lord of the manor, and so much we would cheerfully accord him; but we deny a *right* to an Act of Parliament. We do not dispute him the full benefit of his legal position, in the profits incidentally made by him under the present Inclosure Acts on the distribution of the spoils of any inclosure which is *for the public benefit*; but we cannot see where the right comes from to have his private benefit even weighed by Parliament *against the public interest*. It does not follow from the principle of the Inclosure Acts that the rights of the public were ignored. In order to dedicate the land to cultivation it was necessary to deprive the public of some enjoyment; it was a case where one class of public rights gave way to others of paramount importance. Of the landed property which was by inclosure, as we contend, first called into being, the lord obtained a lion's share. Whether this property

was rightly divided or not, it was created as a means to cultivation for the public good. Inclosure for the private benefit of a lord was not the intention of the Acts, and, taking them as a whole, derives no sanction from them. In the cases where waste lands are profitably applicable for building, and where the interests of both parties are consequently more valuable, this consideration is especially essential. It has been distinctly asserted in evidence on this subject before the House of Commons, that no wrong is done to a lord of the manor by the refusal in the public behalf of an Inclosure Act. Whatever perquisites the present state of a common affords to a lord he may fairly take; but what claim has he to alter the present state, to demand that he shall keep and others forego the enjoyment of a common which by law is, and must remain, a common practically yielding such enjoyment? He may take all that the law attributes to him, but he cannot rightly take what the very nature of common-lands has conferred upon others. Practically it requires permission of Parliament to enable a lord to inclose, even with consent of his tenants, where others have interests (*i.e.* have asserted their method of appropriation) and the refusal of such an Act can take from him no right which he had without it.

It is then unnecessary to refer further to the attempt on the part of lords of the manor to call the *not* granting Inclosure Acts "confiscation." If it were merely a wanton partiality towards particular lords which occasioned inequality, there might be some cause of complaint; but the whole province of the parliamentary enactments being public expediency the grievance is rather of a childish calibre. A railway, a harbour, or government work for public utility, many enactments tending to centralization, have enormously enriched individual landowners, and why not an Inclosure Act? As before observed, we have every reason to be gratified that they do benefit, but, as is usual in doing favours, it brings a lot of others clamouring for the like. They have a teasing cry in the use of the word *rights*. "Others have had their rights," say they; "we ought to have ours." We answer "No; we have given others an Act in addition to their rights which has been equivalent to hard cash. Their *rights* were no more than yours without the Act; we take

no rights from either; we were not bound to benefit either, and are concerned only with public interests; we leave you your rights." The worst of it is, under present circumstances, the public are cramped by having to show all this by an uphill process to a Parliament who naturally prefer the old course of looking at an inclosure as a thing to be sanctioned.

As a matter of fact this necessity for parliamentary sanction, however potent it seems to be from a comprehensive point of view, is insufficient to protect open wastes, even in cases where their preservation is most urgently desired. The so-called principle, that the lord has a right which Parliament must convert into profit, or that he must be paid for its inconvertibility, is largely acted upon. The question of what measures are necessary for more equitable proceeding in future, is one which we enter upon with great diffidence, though we have little or nothing to say about the existing Acts themselves, believing that the sole difficulty arises from the insufficient means of expressing the public wants on the application for parliamentary sanction of contemplated inclosures.

We want positive legislative interference, if the Courts of Law and Equity fail to protect us from a kind of aggression which has unhappily been attempted of late. Some lords, on the strength of their supposed possessory title, have recently, of their own authority, tried to inclose manorial wastes which yielded a large amount of aggregate profit and happiness to their tenants and the neighbouring public. Relying probably on the feebleness of those whose interests and enjoyment they destroy, on the small pecuniary value of the claim, which any individual can oppose, they have acted without the intervention of the Inclosure Commissioners and parliamentary sanction. A Committee of the House of Commons was told in evidence that such proceedings were practically impossible. We sincerely hope it will prove so. We should be sorry to believe that land never intended for private property, which originally came into the power of the lord, the chief of the manor and a public character, for public ends, should be so easily convertible to his private use. If the courts cannot restrain this, we have a right to ask that existing enactments, intended to make parliamentary sanction a condition precedent to inclosure where



public interests are concerned, should be supported by an Act to punish those who try to make inclosure without that sanction. It is not enough to reply that the Acts are enabling Acts, not meant to restrain inclosure that can be made without them,—and that there is no wrong without a remedy. Our case is, that inclosures are being illegally made without the Acts;—that legal definitions and terms of pleading deny us a remedy, and then call it no wrong to take our land. The Inclosure Acts have directed a certain amount of prohibition to this wrong; we want it made punishable, like any other wrong. Possibly the administrators of the law may yet find means to restrain it; if not, we must look to the Legislature.

The Acts under which inclosure can still, at least theoretically, be effected, without separate application to Parliament, are the statute of Merton and the 6 and 7 Wm. IV. c. 115. There appears to us no valid reason for the repeal of or interference with either. The Act of William IV., as already noticed, deals with lands where there is no lord of the manor, and where the commoners are in fact co-proprietors. All wastes and all lands within reasonable distances of large towns are expressly exempted from its operation. This provision alone is enough to protect the public for the present; and the details of the proceedings now applicable to inclosures under this Act seem quite fair towards the public interest in lands of the tenure of stinted pasture.

The statute of Merton (when confined to what it really sanctions) is practically harmless against the public interests from the fact already pointed out, that it only authorizes inclosure against claims of pasture. We have seen that there is nothing in it that can tend to the destruction of a common in which rights are claimed by tenants or others larger than the pasturage claims of common appendant. The House of Commons were told that in fact very few wastes could be inclosed under this Act, and of course these few would not be those which minister to public wants. The repeal of this Act has been suggested, and of course, if lords professing to proceed under this Act are enabled with impunity to disregard interests which it does not bar, the public might profit by the repeal. But in most cases (if indeed there be any) where the statute is

likely to be honestly and legally applicable, it is more probable that the national advantage would be in those instances to let the lord "make his profit" by improving the land.

The ordinary Inclosure Acts dating from the year 1845, and now requiring, in addition to compliance with their details, a special parliamentary sanction to each separate inclosure, are the provisions under which public interests are occasionally liable to suffer. If it be conceded that what these Acts define and proceed to value and compensate comprises all interests which are entitled to a *locus standi* in the matter of an inclosure, we are not aware of, nor is it a part of our subject to investigate, any unfairness or clumsiness in the methods for carrying out inclosure which the Acts provide. There certainly do appear, however, to be important public interests involved, which have no place in the matters submitted to the commissioners, and which are so difficult to value consistently with an inclosure at all, and even to represent as a definite claim, that it would be almost impossible to deal with them in the method in which commissioners necessarily investigate and consider common-rights. But Parliament has saved us from this difficulty by placing these questions of public interests, as we think, on their proper footing, and making them, or intending to make them, purely an element in the parliamentary consideration of public advantage, on which the sanction of an inclosure depends, and for which the power of veto is retained. If then it is true, as we believe, that Parliament may equitably use this reserved power to an extent quite sufficient to protect public interests that the Inclosure Acts cannot operate otherwise than beneficially if this power is used to its legitimate extent, and yet that practically the public interests are in danger, it is to the method of exercising this power that we must apply measures for future protection.

The obvious difficulty of concentrating the expression of a public interest, and bringing it to bear against the interest of a lord of the manor, has been already alluded to. Enough, too, has been said to show the great difficulty of bringing a large body like Parliament to give fair weight to *both* sides on this question. The interests of the lord are seldom talked of otherwise than in legal language, and form part of an assumed

*principle* readily accepted and never questioned, on which legislation should proceed ; while public interest, not having the benefit of such potent definitions, is always a matter to be proved, as against this hastily assumed principle, and is generally dependent on disinterested championship for expression. The same position arises from the circumstance that inclosure having been at first always really for the public benefit, a *primâ facie* presumption seems still to attach to an Inclosure Bill that it is right in principle, and the burthen of proof is thrown on its opponents. The obvious remedy appears to be by parliamentary enactment to necessitate the parliamentary veto, according to fixed principles, for the public advantage. In fact, to raise these principles to the unassailable dogmatic position in which the rival principles in favour of inclosure stand, instead of still vainly expecting a House of Commons to go through the whole process of analysing the "principle" of inclosure, and giving the due effect to ascertained and contingent public interest on the occasion of each Inclosure Bill.

Refusal of parliamentary sanction to all inclosure within certain limits of large towns will probably fulfil the chief requirements of the public. Though this refusal does not require any enactment, it would perhaps be a better warranty of the public interest if all commons near large towns were withdrawn from the operation of the Acts altogether. The combined operation of the Acts and the parliamentary sanction has got into a groove wherein it practically only moves in the one way. If, in a case where, though within the limits, inclosure would be obviously useful, the effect of this alteration might be to necessitate the greater expense of a private Act, yet the increased difficulty would in doubtful cases serve a useful purpose.

But there is another principle which was the basis of the first Inclosure Acts, and which may yet serve as a guide in the question of their restriction. The national advantage which was the motive of the first great movements for inclosure was all to be derived from the *cultivation* of uncultivated land ; building on the land was no part of the public benefit. It is possible to give the fullest adherence to the principle of inclosure tending to the increase of our country's products, and to see in the increased revenues of the lord nothing but a subject

for congratulation, and yet consistently to deny the existence of any such principle applicable to inclosure for building purposes. No doubt, if building is denied on the waste land, it will take up arable land instead; no doubt, also, large towns are a necessary part of national prosperity. But as we cannot thus prevent the increase of building, the result of non-inclosure is in fact to give the town a common and take a wheatfield from the country. If, as we suppose, the common is the greater advantage of the two in a national point of view, we are right in denying that inclosure for building purposes was ever within the principle of the early Acts.

The criterion, whether the land is susceptible of great increase in value by application to building purposes, seems fairly to mark out the line where public interests begin to be in danger. True it is, that an inclosure for such purposes may frequently be an obvious profit to a neighbourhood, countervailing the claims of a public; but an investigation of this question in all cases of inclosure would give the public a hearing as to the rate of increase and over-crowded buildings, from which the value of the common as affecting present and future health and recreation might be comprehended. For instance, if there were opportunity for an opponent of inclosure to show that land was, from its position and the relative value of surrounding land, practically "building land," though inclosed nominally for cultivation, it would not be unfair to make the inference that it was a case for the parliamentary veto, unless the applicant for inclosure showed good public grounds to the contrary. Provisions as to the qualification of such an opponent would easily prevent a frivolous interference with inclosure. A provision that fixed and definite amounts of proof of this nature should entitle the public to a parliamentary veto to an Inclosure Bill, and a short and simple method of taking that proof, throwing on those who claim the profit the cost in doubtful cases of discussing the question more amply, seem to be possible measures for giving larger and more equitable expression to the public wants.

The recent enactment known as "The Metropolitan Commons Act, 1866," remains to be noticed. It will be seen to carry out for commons within the Metropolitan Police District much that

we have desired to have recognised as a principle in the question of inclosure. The important commons near the Metropolis are by it withdrawn from the operation of the former Acts, and the functions of the Inclosure Commissioners with regard to such lands will be no longer to aid the destruction, but to provide for the completeness, of the public user. This Act enables the lord of the manor, or "any commoners," or certain "local authorities," to present a memorial to the commissioners for a scheme for the local management of a common, and provides for the due approval and carrying out of the scheme, the final step, essential to its operation, being embodiment in an Act of Parliament. The *locus standi* thus given (which is qualified by certain regulations as to costs to be paid by memorialists) is a great advance in the public interests from their footing in former Acts. The provision for compensation (contained in section 15) is confined to "estates, interests, and rights of a profitable or beneficial nature," a definition which, rightly applied, is capable of putting the lord of the manor in the exact position for which we have been contending as his due.

It must still be remembered that this Act has only a partial operation. We may hail it as breaking down much that we object to for a particular benefit, but we regret that an Act for such a purpose was necessary at all. Everything that this Act contains to prevent inclosure was properly cognisable under, and ought to have had effect from, the parliamentary power of interference with each separate Inclosure Bill. Everything in it which disregards the mere obstructive powers of the lord of the manor ought to have been unnecessary. As long as the principles which dictated this Act are supposed to have only a local and special application, as long as they have not, *per se*, due weight on the occasion of *every* Inclosure Bill, we are not satisfied.

In the provisions for regulating the metropolitan commons we have much to thank the Act of 1866 for. Provisions of this class must be incidental to the recognised public right to keep the open spaces. The form of the regulations will of course depend on the circumstances of each case. A direct boon to the public is also contained in a clause permitting grants of crown rights in or over the metropolitan commons.

There is one other matter tending to the destruction of some manorial wastes, which must not be left quite unnoticed. It belongs properly to the Common Law part of the question, but is noticed here as possibly requiring some further legislative interference. It appears, from a case already quoted,<sup>d</sup> that a lord of the manor may by custom, but not under the statute of Merton, take minerals from the waste, and thus render it more and more inapplicable, if not (by reason of open pits, &c.) dangerous, for public use. Clearly the lord may justly assert an ownership of timber or minerals which he has openly treated as his property, but if others have appropriated the land to purposes which are inconsistent with a power in him of taking these profits, he has practically not asserted such an ownership as enables him to take them. The legal question, whether such a custom is bad, as going to the destruction of the common, seems to be yet unsettled; and as far as the *public*, as distinct from *tenants*, are concerned, it is not clear that they have any right to claim that their enjoyment of a common where such a custom prevails should be made equivalent to enjoyment of one where it does not prevail. But the concession of this point depends upon the recognition to which they are entitled, that they are not to be passed over (as they would be at law) in enactments which value the custom. On the whole, the only particular in which this question seems to require present attention is the occasional danger.\* It would do no harm if the duty of temporarily fencing pits and quarries in open lands were by statute enjoined in all cases on those who get minerals from an unfenced waste.

Something more may possibly be done to prevent injurious inclosure by taking advantage of the forestal rights of the Crown. These rights have often been given up in order to facilitate inclosure; the small perquisites which they are capable of affording have been realised with most exact stewardship without thought for the public. Of course, the good management is very commendable, but surely it would not be asking too much that the Crown, amongst its more costly efforts for public good, should occasionally forego this much management and

<sup>d</sup> *Bateson v. Green*, 5 T. R. 411.

\* Accidents have happened at Wimbledon.

small profit, in order to preserve a park to the people. Some of the lands most serviceable to the London public for recreation lie in royal forests, and might have been preserved by the mere will of the Crown. There are common-rights which are peculiar to these forests, being claimed in respect of land lying within the forest; they are extinguished by disafforesting, an incident which we might expect from their history.

The history of the king's forestal rights is probably nearly connected with that of open lands. We know of nothing in these Crown rights which could interfere with all the enjoyments of commons by commoners, and even the public, to the full extent which we have described. The Saxon kings, like the rest of their race, were one and all hunters (King Edward, for instance, was killed by Elfrida on his return from hunting); but, in their time, there are no recorded instances of rapacity for hunting lands. We may suppose that the mere right of the king to hunt was the only thing which distinguished these from other common and woodlands. The struggles and bitterness which ensued on this subject in Norman times are well known. In the charter of Henry III. provision is made for the restitution of property which had been afforested, but what his predecessors had made forest of their own demesne should remain forest, saving the right of those who *formerly* had pasturage and other things out of the said woods. "Formerly" must refer here to a time previous to the charter of Henry I., when there were "rights" of pasturage and "other things." Forest land was probably, saving the confirmed encroachments of the early Norman kings, all public or common land originally. The perquisites as hunting ground belonged to the aristocracy, who were the traditional huntsmen, and now that royal forests are cultivated, and manors are intersected with hedges, the same prerogatives of game on more dandified principles belong to the same class in their modern comprehensiveness. If the poorer part of the community have lost many of the sports that the open land afforded to them, it is to the insufficiency of their remedy, and not to the absence of right, that the loss must be attributed.

The land, open pastures and woodlands, once, perhaps, looked upon only as vast hunting grounds serving for pasture, while,

at the same time, they formed a protecting ring round the mark, and possibly hallowed by superstition,<sup>1</sup> admitted of no idea of property. The terms on which portions were appropriated for cultivation as required could not at first affect the unappropriated residue. With the rise of an aristocracy and the concentration system of feudality came terms which nominally attributed all that was left to a lord, and the law-courts, as a fundamental principle, conceded the whole that could be arrogated under the widest interpretation of these terms. But the clog of custom, sticking in the machinery of the law, was a practical assertion of a right coeval with the birth of English institutions. No definition of these customs will alter the fact that the lord is prevented by them from working the legal engines for inclosure beyond a certain point. He must come to the tribunal which watches over public interests; he must apply to Parliament before the common lands will yield him more of that ownership which he has nominally arrogated to himself. The public have no favour to ask, it is the lord who wants a favour. The public need only give nothing—sit still and preserve their treasure by their dead weight. If an enactment is wanted it is to put a systematic restraint on our generosity in granting inclosure to lords, not to curb their power or diminish their right.

This position has been gained by the stubborn conservatism that has in this country preserved national and popular institutions against the feudal, the monarchical, and the democratic revolutions or innovations which have marked the course of civilization. At the cost of a little fallacy and complication, we have taken the element of oppression from institutions without sweeping them in name away or disturbing their useful functions.

The feudal lord himself, who can trace his ancestors and his family estates in 'Domesday Book,' is now the most cherished specimen of an English gentleman, associated—often none the less for being a little obstinate and dull—with all

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<sup>1</sup> Grimm places the sacred groves in the "wood" of the mark. They of course were not known in this country in Saxon times, but the universality of their existence leaves it certain that they left their stamp on the mearo-land. The king's rights may have borne some relation to his succession to the old priesthood.



other endearing pillars of our stubborn liberties. Boroughs have still kept a grand amplification of the old free municipal system of self-government by aldermen and ancient courts. Hume was able, in strict analogy with legal definition, to show that these boroughs were derived only from "a low set of tradesmen" who were dependent on the monarch and great lords, and that tenants had nothing but what they derived from the bounty of the aristocracy. But Hume and the royal faction, who had the benefit of his advocacy, were alike powerless against the solid rights he deprecated. The "low tradesmen" have kindled a spirit which is making serious attacks on the dogmas which satisfied the philosophical conservatives. Splendid social distinctions have lost much of the support of hereditary fiction; even the law itself has abandoned some of its axioms in favour of more practical considerations. Estates once exalted *in nubibus*, or cherished *in gremio legis*, have been consigned to oblivion by their inutility. When not only useless but oppressive, mere legal title has been unhesitatingly curbed. Is it, then, impossible that "The freehold of the soil is in the lord" may one day be a harmless expression?

## APPENDIX A. (*Courts.*)

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If the writer has not complied with the terms of competition in showing the nature of the lords' courts, it is from sheer inability to make out any distinct historical principle on which the jurisdiction over the public waste was given to the different kinds of court. That *all* the courts had such jurisdiction is certain, but as some control must have existed in each original mark, it is a fair presumption that this particular jurisdiction of other courts came from the absorption of the functions of the original mearc-mote. The grants of jurisdiction raised also similar functions in the *private* courts, if we may call them so without forgetting the analogy of their duties with that of the court of an official alderman.

These latter courts are less the predecessors than the assumed type of the modern lords' courts. In all probability the mearc-mote is the modern court-leet, though perhaps never called by that name ("leet" from "geladhian," to invite) until amalgamated with other primitive mearc-motes or included in hundred districts.

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## APPENDIX B.

In speculations on the growth of primitive society, confirmation is not to be looked for. Coincidence in speculations are, however, of some help. In mythology, which Max Müller says is but "a disease of language," we have a people's own way of expressing what they know or think of their origin, and as the legends of a people of this great family have given us a direct account, we venture to refer to it.

In the 'Rígs-mál,' one of the songs of the elder Edda, the birth and education of three men, stems of classes, are told, Throell, Karl, and Jarl.

Throell (thrall) comes first, his children lay out a farm, "logðu garða." Karl (churl) follows, his children make a village, "bú görðu." Jarl (earl), is taught to acquire a heritage and build a house.

We have given two or three of the original words because their etymology is simple and appropriate to show how exactly the probable history is represented. Garða is our word "yard" or "gar-

den," and means the simplest form of farm. Bâ is a settlement or town (Derby, Appleby, &c.) Lögðu, "they laid out;" Görðu, "they made." (The Scotch still use "gar" for "make.")

## APPENDIX C. (*Wills.*)

IN the will of one Ælfred, who appears to have died about the end of the 9th century possessed of lands of bocland and folcland tenure, is the following passage, which we translate from the 'Codex Diplomaticus':—"To Athelwald, my son, three hides bocland, two hides at Wheaton and one hide at Gatton; and I give him thereto 100 swine, *and if the king will accord him the folcland*, let him have it and use it, and if that be not so, then I give him whichever he will, either the land at Horsely or the land at Langafeld," &c. This is only one among many instances of the inability to devise folcland without the consent of the king.

The quality of devisibility which belonged to boclands was gradually lost; how, we do not exactly know. We know that our old lawyers make short work of it with the system of feudal tenures they adopt and call Norman; but as most of them, Spelman for instance, make the assertion that the Saxon could not make a will, we cannot be satisfied with their dicta.

The existence of wills after the Conquest, chiefly grants to monasteries, with special confirmation from the king, is only negative evidence that such confirmation was required. So much of the land had got into the hands of Normans, who would hold it according to the strictest feudal (on the model of folcland) tenures, that the case of an English ancient freeholder making a will without consent would be very rare. The custom of gavelkind and the special customs of some ancient boroughs make it quite clear that the right was not altogether gone in Henry II.'s reign, a point which seems to have been observed by Sir Matthew Hale and Sir Martin Wright, though the latter will have it that the right was only allowed to remain where "it did not matter" (in the most important towns!) We venture to suggest that the real interference with the right was by special enactments restraining alienation of *any kind* to the prejudice of heirs and kindred. There is a passage in the laws of Henry I.: "Si bocland habet non mittat eum extra cognationem suam;" such a restraint was the practice of most kindred nations. The "odel rights" of an heir in Norway are a good modern instance.

APPENDIX D. (*Records.*)

As to grants of pasture-lands and the control of those held in common by public officers, we have records in the 'Codex Diplomaticus,' and some few allusions in the early English laws. We are not able to derive much inference from the grants as to the limitations of common pastures. The grants usually contain general words, "cum silvis, cum boscis," &c., by which all the right of the grantor in folcland or bocland would pass, whatever were the conditions of tenure involved in those rights. Special grants of definitive quantities of pasture are also very frequent, which is natural, since this was the usual method of enjoying land. The right of the king to send a certain number of cattle to graze in common pastures, or to receive an equivalent toll and the burden of doing direct public services in repair of roads, bridges, &c., are often referred to. All this is strictly consistent with the state of common-rights as we have conceived them. We give extracts from two charters, one merely as a specimen, the other as appearing to us to raise a doubtful point, which may, without explanation, be thought to be proof contradictory to some of our statements.

The following is an account of a dispute about pasture from the 'Codex.' "In nomine trīno divino, in qui est Deus benedictus in sæcula, Amen." "In the yeare that was 825 winters from Christ's birth and Beornulf was king of Mercia, there was a great synodlie meeting at Cleofashoas, and there the king himself and all his bishops and his aldermen were gathered together, and there was much talk about the wood leasowe at Sutton. The swain-reeve (bailiff?) would push the leasowe further and depasture the wood more than was of olden right. Then said the bishop and his men that he claimed no more than had been settled in Æthelbald's days, pasture for 300 swine, and the Bishop had two shares of the wood and the pasture. Then said Wulfred the archbishop and the people, that the bishop and his people must make oath that it was so settled in Æthelbald's days, and that they sought no more. Then the bishop took the oath to Eadwulf the alderman before all the folks, &c., and the swain-reeve was at home in Sutton, and he rode to Ceastre (Worcester), and saw the oath, and did as the alderman Eadwulf bid," &c. The disputants here are the alderman who had the control by his "swain-reeve" of the people's common, and the grantee of part of the folcland.

In a charter of Æthelred, A.D. 982, the "mearc-lond" is mentioned as appendant to a grant evidently of folcland, "ruris quantum sed communem portionem;" and the following expression is taken as

showing that the meadow was, under some circumstances, capable of division: "The mill and the millhouse, and so much of the meare-land as belongs to three hides." We do not see that even in this solitary instance a division is necessarily implied; the expression is more applicable to an appendant right of enjoyment than to a territorial grant; and, with the light that Mr. Kemble has thrown on the subject, we think that we can so understand it. The mills were public institutions, and stood in the folcland of the mark district. A grantee of this folcland might not always be entitled to all the rights of the free marksmen, but we need not conclude that he was always or even often excluded when, by royal favour, at a time when royal power was great, he acquired a holding of so important a portion of folcland.\*

This particular grant appears to be in bocland tenure, "*post vitæ suæ lancem cuicumque sibi placuerit in perennem derelinquat hereditatem*," and we may easily suppose that it was *meant* to give a possession which would include membership of the mark and enjoyment of the meare-land either with or without the approbation of the freeholders.

## APPENDIX E.

THE following passage from Stiernhook, '*De jure Sueonum*,' is given merely to show the consistency of our account of the origin and nature of common-lands with the comparatively modern condition of such lands among nations whose antiquities refer them to a common origin with ourselves, and whose primitive institutions were undoubtedly identical. It must be remembered that it refers to a country where the great bulk of the land is uncultivated, and is with great difficulty rendered fit for cultivation. We give a rough translation from the Latin instead of the original, merely because it is only worth a passing glance, and nothing hangs on the digestion of the original by the reader of the main part of our subject:—

"Finally, there are some (lands) public or rather common to a

\* Mr. Kemble, in another passage, speaks of the certainty of these royal grantees gaining the ascendancy over the old thane nobility. "The marksmen might raise them from their rolls," but their fair landed possessions were an irresistible power in themselves. We should conclude that they did not rather

than that they did ordinarily resist them in these rights.

Just so now, possession and rank in a county generally end in conferring the position of magistrate, but the lord lieutenant is not bound to confer it.

parish or to districts, or even to the inhabitants of one district, as pasture, wood, rivers, or lakes, which only to the inhabitants of that parish or vill remain common as long as is convenient to them as neighbours; where, indeed, one enjoys more than another, a division for farming purposes is accorded by valuation (*juxta censum*) and the old canon; for it is presumed that he has cause of complaint who only seeks that which can be his. If, before the division is asked for, something from the common is cultivated and tilled, the old law permits that to the cultivator for six years, sometimes for ever; but on this condition, that he is able to prove it fit to his neighbours to be cultivated; and, after he has so cultivated it, the whole cultivation shall be divided among his companions and neighbours in equal shares. Herein is more equity and reason than in modern law, which only concedes the right for three years, and then replaces it in the former state, no doubt with regard to this, that it cannot be cultivated without common injury, though it would be no injury if everybody strove to cultivate in proportion to the favour shown by the old law to cultivation. This division was made only among neighbours of one village; but where the question was among many villages, it was made, not according to the number of inhabitants, but of villages; and, whether they were many or few, equal portions were given to each, unless the wood were fruitful, and therefore fenced; for the latter was divided by valuation among the various villages, which law obtains now.

“The common places of any territory or a province were seldom liable to division; still, people could have the usufruct or prescribe, as we see in Upland in the case of the manor or common woodland at Troyden, which is so much connected with royal privileges and circumscribed with laws; but now little is left of this.

“Prescription was when some of the wood was inclosed with fences, and by the connivance or silence of those who were interested in it was so long usurped, until ‘*putrefactis duabus tertiam restaurassent*.’<sup>b</sup>

“In vills near to a public waste-land something could be taken from it by certain measure, as the Ost Gothic law determined, by shouting or casting—that is, in water by throwing, and in a wood by shouting. For placing a boat nine ells long on the shore, with the prow in the reeds and the stern in the deep, so much space as a man from the stern could measure off by throwing a spear, that he held for his own against the community. In a wood, a man standing on the farthest limits of his land, as far as, when he raised his voice, its sound could be heard on a tranquil night, at its

<sup>b</sup> An expression which I do not understand.

shortest, so far the bounds of his possession stretched into the public place.

"And indeed places can be made public, or the commons of individuals.

"The right which each one has in such places, so far as public or common, consists principally in wood, fishing, and hay-cutting.

"Only in these separate things they do not prescribe ancient right, but it is according to the prescription.

"Wood was not only wood for fire, or for building and fencing, but for charcoal-burning, baking, &c.; it is even now allowed, but under fixed restrictions. Pasture and piscary are promiscuous, profits from hay-cutting alleged for a time certain. And indeed about this there never was any doubt; about the dominion and proprietary of them there is more difficulty, not only because the usufruct belongs to all equally, but also because where there is controversy between lands of this kind, between districts and provinces, the question was in the hands of the inhabitants themselves; and if anything was to be cultivated or sold by their consent, it was not the prefect or vicar of the king, but a provincial or hereditary or territorial officer who settled it. There could be no doubt as to their right to the dominion, especially since they enforced the public revenues, from which they reserved one-third for the king, three-fourths (!) for themselves—no slight proof of the democratic state when they divided the fiscal right with the king.

"The great king Ladislaus, in the assembly held at Stockholm in the year 1282, is said to have asked for a law that, with regard to shores, embankments, minerals, and quarries, appropriated to provinces or individuals, wheresoever anything should be found fit for cultivation and was not yet occupied by private men, should belong to the fiscal; and many rivers, fisheries, minerals, quarries, and woods which, according to that decree, are the king's residue, are now in private owners. It seems, nevertheless, that there was an ancient right in the kings to the dominion of such kinds of common lands from the law of the Ost Goths, where a procedure is laid down to be observed by the kings in disposing of such lands. But in the lapse of time, as is always the case under such circumstances, there being obnoxious or incapable kings, the fiscal rights were either remitted or omitted.

"For it is quite certain that in after-times places of this kind, without any distinction of province, hundred, or parish, were attributed to the king, and the revenues were called royal, and the king's vicar, or president of the province, had the power of regulating them, defining the bounds and amount of cultivation, imposing the tax," &c.





III.

AN ESSAY

SHOWING THE

ANCIENT AND MODERN RIGHTS

OF

LORDS AND COMMONERS

WITH REFERENCE TO

MANORIAL WASTE LANDS.

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"Vigilantibus non dormientibus jura subveniunt."  
LEGAL MAXIM.

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By F. OCTAVIUS CRUMP,  
STUDENT OF THE MIDDLE TEMPLE.



## ESSAY III.

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### INTRODUCTION.

THE object of this introduction is to remind those who may peruse this Essay from a popular point of view that the labour involved in its production has been of a peculiar order. Probably no tenure has been the subject of more lavish definition than that which prevails upon manorial land. Probably also no legal problem has given rise to more diversity of judicial opinion than have the questions of the origin of certain classes of tenantry, and the rights of lord, tenant, and stranger upon manorial wastes. Our task has been to draw light and order out of dimness and confusion, and from between the diverse and conflicting definitions, dicta, and decisions of learned men to snatch principles which may be broad, certain, and intelligible; clear and convincing to the popular mind, as well as logical and sound in the opinion of the legal profession. We have arrived at some of our conclusions, indeed, with diffidence, because we felt that we were working in a field of inquiry where the loftiest and strongest judicial intellects had worked before with uncertain and questionable results. But now that we look upon the Essay in its complete form our confidence in those conclusions is strengthened.

*Sept. 29, 1866.*

## I.—THE ORIGIN AND HISTORY OF MANORS.

WHEN land was won by the sword, and when tenures were adjusted according to the law of might, property became the representative of power. The chieftain who possessed the largest number of retainers obtained the largest share of the forfeited territory in every conquered country. In Germany every state originally comprehended a sovereign who acted for the interest of the community, chieftains who governed in different districts, and lastly the mass of the people. The first was ambitious to support with lustre the honour he sustained. The chieftains were studious to subserve his favour. The people ranged themselves under the banners of the chiefs whom they admired, and devoted themselves to their fortunes. It was the great emulation of the chiefs to excel in the number and courage of their retainers. This was the dignity which most attracted them, and the power they courted most. Their retainers formed their ornaments in peace—their defence in war. The chief fought for victory—the retainer for his chief. These connections and this subordination followed the barbaric nations into their settlements, and here we may perceive the foundations of the feudal association.<sup>a</sup> These foundations were laid first in this kingdom when the Goths and the Vandals overran the Western Empire in the fifth century. The Danes built upon these foundations, and the Saxons consolidated the institutions thus created. To commence our investigations at a period anterior to the Saxon conquest would be both obscure and useless, for all the rights we enjoy from custom, prescription, usage, or Common Law, we derive and trace from the Saxons.<sup>b</sup>

Little is known of the nature of Saxon manors. It is certain that when the Saxons made themselves masters of the country in the sixth century they introduced the practice of granting to the servants of the chief such part of his demesne as could not be held by himself, and they held

<sup>a</sup> Stewart's 'View of Society in Europe.'

<sup>b</sup> Gurdon.

their lands free from mesne service. It is certain also that under the rude northern nations the only tenure was a military tenure, and that the Saxons substituted services in corn, cattle, and money. We learn thus much from Lord Coke among other authorities, but beyond ascertaining the fact that Saxon manors comprised demesnes and services he declined to venture. Their demesnes they termed inlands, because the lords kept them in their own hands and enjoyed them in their own possession; their services they termed utlands because those lands were in the manurance and occupation of certain tenants, who, in consideration of the profits arising out of these lands, were bound to perform unto their lords certain services. Lord Coke believed that, had he looked for further information concerning those manors, he should have been accounted more curious than judicious.<sup>c</sup>

Backed thus by the authority of Coke and of Gurdon, we shall assume that we are fully justified in dating our inquiries from the time of the Domesday survey.

The perspicuous and able topographer of Hampstead, in a most intelligent note, has started an interrogatory to which he himself offers no satisfactory reply. He asks how it is that the present limits of manors in many instances so greatly exceed the limits fixed by the Norman survey. We can conceive no better mode of tracing the history of manors than by giving a full reply to this interrogatory.

In the first place, therefore, we perceive the land divided into certain baronies under the Saxons. The Saxons being defeated at Hastings and the noblest in the kingdom slain, the process of forfeiture commenced.

But notwithstanding the immense extent of territory so appropriated, some baronies escaped the grasp of the victors; they remained in the hands of their Saxon proprietors and are known as ancient demesne. William paid his chiefs for their services by large grants of land, and a similar method of payment prevailed between the chief and his soldiery. Grants by copy existed in the Saxon times, and they were continued under

*Extension of  
the limits of  
manors.*

*Forfeiture and  
redistribution.*

<sup>c</sup> Coke's 'Compleat Copyholder.'

the Normans. Thus, setting aside for a while the servants of the chief, we have two prominent species of tenantry, freeholders and copyholders. When the chief had given certain land to his officers and the highest orders among his followers, who may be said to represent the freeholders, he leased other portions to be held at his will. The former rendered certain services; the

latter uncertain services. A great deal of doubt  
 Land held by copyholders. has existed concerning the land held by copyholders,

for, it is argued, all the land granted by copy was carved out of the lord's demesne. The lord's demesne, according to the vulgar notion, is the land retained for the supply of the lord's table. This being so, and bearing in mind the number of copyholders which subsisted upon every manor, it might seem difficult to believe that the copyholder possessed any estate of his own; rather that he was the mere servant of the lord, or pure villein, to use the old term. This induces the elementary inquiry, what was the lord's demesne?

Undoubtedly we must not give to the term demesne lands the contracted signification contended for. In the case of *Fowler v. Seagrave*, 2 Bulstr. 254, the definition of demesne lands (*dominicales*) is "all such lands of the grantee as are not in servition of the freeholders." Bracton gives to it two meanings, as applying first to what a man has in his own hands for his own table and support, and secondly to what he has in the hands of his villein. He indeed assigns to it a further and more extended signification, viz. whatever the lord holds in fee. Fleta says, "Dominicum est omne illud tenementum de quo antecessor obiit seisis ut de feodo," &c. Spelman says, "Dominicum dicitur patrimonium domini atque idem quod dominium," but he adds that it is "ad significandam fundi proprietatem vel manerii partem, hoc est, terras et prædia quæ dominus hæreditariè non tradit suis tenentibus sed aut suipsius retinuit, aut ad annos aliquot sive voluntatem elocavit." Cowell says, "Dominicum est terra intra manerium quod dominus feudi in manibus suis retinet."<sup>4</sup> Clearly, therefore, the demesne of the lord comprised such part of the manor as was not held by

<sup>4</sup> *The Attorney-General v. Parsons*, 2, Cr. v. Jerv. 279, 1 L. J. Rep. N. S. Ex. 103, supports this view.

the freeholders. When the military tenure was done away, and services were rendered in the shape of corn, cattle, and money, it was no longer necessary that the lord's demesne should be strictly defined, for he received from all his tenants that supply for his table to which his demesne was in the first instance especially devoted. We thus see clearly that the cultivated portion of the manor was divided into two parts, one of which was held by the freeholders, the other by the lord, who retained any portion which he required for private use and let the residue to tenants who were liable to be ejected according to his will or caprice. The uncultivated division of the manor was called THE LORD'S WASTES.

So much for the origin of manors. Now let us turn our attention to the extension of their limits, which seems to have been referred to by the topographer of Hampstead in order to establish one of two notions—either that the lord inclosed the waste lands with impunity, or that he incorporated in his manor land which never was manorial. This apparently arbitrary extension of the boundaries of manors *primâ facie* is a matter of much importance, because if they have grown in an irregular manner, like a creeper, and embraced and given their lords jurisdiction over land not included in the original grant and not legally subject to their jurisdiction, all calculation concerning rights, whether of lord or of tenant, would be wild and inconclusive. And it is the more necessary to examine this point carefully, Lord Kenyon, in the well-known case of *Glover v. Lane* (3 T. R. 445), having expressed the opinion that “many of the places that are called manors would not be found to be such in point of law, if the matter were strictly examined.” It is obviously impossible in this Essay to inquire into the titles of many lords of manors and thereby to frame a conclusive argument one way or the other, but we may glean sufficient facts to show that the growth of manors has been natural and legitimate, and that the cases in which the contrary can be established form the exceptions to the rule.

It may not occur to many to dispute the accuracy of the Domesday survey. This work is endowed with all that dignified authority which antiquity confers. Accuracy of the Domesday survey.

Mr. Eyton, however, in his learned 'Antiquities of Shropshire,' states that it was almost impossible that the survey could have been accurate in all cases, instancing particularly the manor of Morville, which at the time was in a condition of uncompleted but meditated change, or, in other words, which was in a "shifting" condition. This remark cannot be regarded as applying solely to Morville.

Shifting manors.

Many other manors likewise must have been in a shifting condition. Again, it is beyond doubt that many of the wastes existing in early times were water-wastes, which could not be included in the original survey. For instance, we find it recorded in Suckling's 'History of Suffolk' (vol. i. p. 35), that the manor of Barsham was originally described as one leuca and a half in length, but only one-half in breadth.

Water wastes.

"As a wide tract of meadows was at that time covered with water, and consequently not included in the survey, this mensuration accords with the upland portion of the manor, taking the leuca at a mile and a half." To multiply instances we need not travel out of this county of Suffolk. In the reign of the Confessor, and also after the Conquest, there were but ten acres of meadow in the parish of Gorleston, from which circumstance the historian concludes that the fertile lands which now lie between Braydon and the town were covered by the tides, or formed boggy salt-marshes at the best. At Gunton 1000 acres were formerly covered by the sea, and afterwards became part of the manor. "Outney Common," says Suckling, "is a large extra-parochial tract of meadows, containing 402 acres. It was formerly the bed of the Waveney, when its waters flowed in a more expanded stream. In 1707 the lord of the manor and the commoners agreed to reduce the commonages or right of depasturing cattle thereon from five to three beasts,"—thereby showing that the land upon its recovery became subject to common-rights.

Consolidation and merger again have extended the old limits of manors. Confining ourselves to the county of Suffolk, Suckling, in his 'Chronicles of Darsham,' mentions that the *four* manors existing there were "not all consolidated, as is supposed, but form at the present day *two* distinct lordships. In Ilkeshall large manors and estates are

Consolidation and merger.



said to have merged into various channels." To serve the double purpose of proving that lords were not hasty in seizing land upon which their tenants had rights, and that manors were increased by purchase, we cite the case of Ashby. Upon the waste of that manor rights of turbary were exercised until pits were made which were filled with water, and the tenants exercised the right of piscary. The soil was then purchased in by the lord—not approved, be it observed—and became part of the demesne.

We might proceed to refer to the disturbing influence of civil war and the arbitrary action of kings with favourites, which undoubtedly destroyed many old boundaries impossible of resurrection. The titles of the kings which civil contests successively placed upon the throne having been tacitly allowed although not admitted, their deeds are not now to be contested. Apart from this, we conceive that we have said sufficient to show that, at least in very many instances—for Suffolk may be taken as a type—the large manors which now exist were not extended beyond their original limits by the arbitrary encroachments of the lords, or by the selfish appropriation of reclaimed water wastes, but that the additions have been either the free gifts of nature which the lords alone were entitled to accept, subject to the exercise of common-rights, or are the results of *bonâ fide* purchases and subsequent incorporation by the lords, of consolidation, or merger, or grant from the Crown, or the disruption of estates and the destruction of boundaries arising from a state of civil war.

## II.—EARLY RELATIONS BETWEEN THE LORD AND HIS TENANTS.

We have broadly defined a manor as consisting of demesne and services. The lord was sole owner under the king of the soil of every parcel of the manor by virtue of the distribution which took place at Salisbury in the 17th year of William I. The position of the lord was that of a grantee holding land by a grant, coupled with

Purchase of  
waste land by  
the lord.

Civil war.

Position of the  
first lords.

which was a reservation of certain services to the grantor. These services were strictly reserved by the Conqueror and his sons, and consisted of a number of knight's fees, and in the time of the military tenures the services of tenantry were necessary to enable the lord to render his services to the king. Subinfeudation did not invariably create a manor. Where services

Seigniorial in gross. were reserved to the grantor and his heirs simply, he acquired a seigniorial in gross over his tenants,

but where a person, having an extensive tract of land, erected a castle or mansion upon it, to which he annexed a demesne for his own maintenance and granted out the rest to inferior persons to hold of him and his heirs, as of his castle or mansion, by certain services, the whole became a manor, of which the proprietor of the castle and demesne was lord. Ety-

Manor. mology seems to point to the residence of the lord among his tenantry. Be the derivation of manor

from a *manendo* or from the French *mesner*, the one indicating residence, the other direction or guidance, the presence or direct influence of the lord is to be inferred. This cannot, however, have been the case, because the Conqueror was too wise to consolidate the power of a baron within one county, and thereby create a kind of local sovereignty. Certainly in one instance an earl held almost a whole county, but the king's general rule was to divide the lands which were the subject of his grant, and it was usual for the lord to take his title from his largest manor. He could not have exercised a personal influence in every case, and where he was unable to do so, his steward acted in his stead.

We cannot estimate exactly the power of the lord until we have investigated the condition of his tenants and the burthens which they bore as the price of the privileges of tenancy. Looking back to the earliest

Early condition of tenants of manors.

times, we see the vassal kneeling, and putting his hand into that of his lord, and acknowledging him as his superior. "I become," he said, "your man from this day forward, for life and limb and earthly honour." The lord, receiving him in his arms, gave him the kiss which bestowed his countenance and favour.

Homage.

Faith.

This rite, known under the appellation of HOMAGE, expressed submission and reverence on the part of the vassal, protection and defence on that of the lord.

The oath of **FEALTY**, or the engagement of fidelity, was then pronounced. "Hear this, my lord," said the vassal; "I will be faithful and loyal to you for the tenements I hold. So help me God and his saints." Upon this state of things Dr. Stewart, in his 'View of Society in Europe,' thus proceeds to comment. In every act of civil life they found alike the uses and advantages of their union. In the castle of the lord the vassal added to his retinue and proclaimed his magnificence. In his court he assisted in the administration of justice. In the field he fought by his side and covered his person with his shield. On the foundation of their connection, and of that of the land or fief which the former bestowed on the latter, a train of incidents were to arise.

The first incident is that of wardship. The lord lavished care upon the expectant heir of the fief, and educated him in his own hall. He felt a pride in observing his approaches to manhood, and delivered to him on his majority the lands of his ancestor, which he had been studious to improve. Wardship.

The vassal on entering into his fief, conscious of gratitude, and won with the attentions of his lord, made him a present. This produced the incident of **RELIEF**. Relief.

The chief and his vassal then joined their endeavours to find the lady suitable to the tastes of the one and the policy of the other. This attention gave establishment to the incident of **MARRIAGE**. Marrriage.

When the superior was reduced to distress and captivity in the course of public or private wars, when he was in embarrassment from prodigality or waste, when he required an augmentation of means to support his grandeur or to advance his schemes of ambition, the vassal was forward to relieve and assist him by the communication of his wealth. On this foundation grew the incident of **AID**. Aid.

When the vassal gave way to violence and disorder, or when by cowardice and treachery, or any striking delinquency, he rendered himself unworthy of his fief, the sacred tie which bound him to his lord was infringed. It was necessary to deprive him of his land and to give it to Escheat.

a more honourable holder. This was the origin of the incident of ESCHEAT.

The vassals attended to the wants, requirements, and order of the retainers who were immediately beneath them—the lords supported their sovereign. Society under the feudal system was complete.

“Out of the sweets of love,” we are told, “a fatal bitterness was engendered.” Whereas property, as we have stated, originally fixed the limit of the power of its possessor, in later times it threatened to become the source of power almost absolute. Mercenary views soon took the place of the lofty feeling of affection between a lord and his vassal. Thus the wardship of the infant vassal, which the lord once considered as a sacred care and an honourable trust, came to be regarded in no other light than as a lucrative emolument. The acquisitions of the vassal, which, in the early state of agreement and cordiality, were a strength to the lord, seemed now to detract from his domains. He committed spoil upon the estate which of old it was his pride to improve. He repeatedly insulted the person of the vassal. The heir upon his joyless majority received the lands of his ancestor, and while he surveyed with a melancholy eye his castles which bore the marks of neglect, and his fields which were deformed with waste, new grievances were to embitter his complaints and to swell his passions. The Relief, originally merely a present at the pleasure of the vassal, was consolidated into a right. The superior, before he invested the heir in his land, made an exaction in which he had no rule but his rapacity. The marriage of the vassal was also abused, and made a source of profit. The superior had no check but from his humanity—the vassal no relief but in remonstrance. The Aid, which had been bestowed by the vassal to relieve the distress of the lord, was arrogated as a duty and a tax. The lord called for an aid or contribution when his eldest daughter was married, and when his eldest son was made a knight, and when his own person had to be ransomed.

Cowardice, dishonour, and treachery, the ancient causes of forfeiture, gave way to ordinary and trifling delinquencies. If the vassal refused too long to attend the court of the superior

Abuse of feudal incidents.

and to take the oath of fidelity, or committed petty offences against the private feelings of the superior—such as kissing his eldest unmarried daughter—he forfeited his estate.

The incidents which had grown with the progress of fiefs continued their operation after the introduction of tenure by knight-service. Feudal severities prevailed under William and his sons, under Stephen, and under Henry II. They were not unknown in the reign of Richard II. King John was the very monarch to revive all that was arbitrary in the constitution of the country which he governed, but the good sense of his barons, impelled by the loud remonstrances of the vassals and the common people, brought order out of an incipient revolution, and Magna Charta established the rights and liberties of all classes in the nation. Another source of relief arose out of custom. The inordinate growth of the power of the lord had carried with it an undisputed right, or assumed right, to levy his dues in whatever mode he esteemed most convenient or was most consonant with his feelings towards the particular vassal. Custom gradually established the remedy by distress, which, whilst it deprived the lord of his power to exercise those hard measures which had been submitted to with continual remonstrances, substituted an orderly and regular method of obtaining damages for non-payment of rent, for neglecting to do suit and other services—for this <sup>Distress.</sup> the lord might distrain of common right;—for amercements in a court-leet, also of common right, but in a court-baron a special warrant was necessary, and for trespass of beasts *damagefeasunt*.

Having thus examined the relationship existing between the lord and his freeholders generally—for we reserve our investigation of the right attaching to the uncultivated portion of the manor for a separate and exclusive division of our subject—we may proceed to the lower order of tenants.

The origin of copyholders has been a subject of learned conjecture for centuries. Authority is in favour of the supposition that they arose out of a state of pure villenage or servitude. Lord Loughborough (in *Grant v. Astle*, 2 Doug. 7) is of a contrary opinion, and he founds his conviction upon this:—"That in Germany there exists at

Origin of copyholders.

this day (1781) a species of tenure exactly the same with our copyhold tenure, and that there exists likewise at this day a complete state of villenage, so that both stand together, and are not one tenure growing out of another and by degrees assuming its place." This is a very strong argument, considering what we have already shown, *viz.* that we derived our feudal associations from Germany; but the learned reporter urges that it appears a very inadequate ground for rejecting the opinion found in our own highest legal authorities from the earliest times, that copyhold tenure is derived from villenage. Does it necessarily follow, he asks, that even in the part of Germany here alluded to the same process has not taken place? The only reply is that there is no evidence to show it. To our humble judgment it appears that some confusion has arisen in

Confusion of  
names.

the use of names. For instance, we are told that copyholders were originally villeins. Now in the Domesday Survey we find mentioned *villani*, *bordarii*, or *bordmanni*, and *servi*, and an authority says that the latter were direct slaves, of which the poor Britons that stayed amongst the conquering Saxons were the greatest number. One explanation of this is that the *servi* were the villeins in gross, and that the *villani* were such as held some house or land burdened with services, and went with the lordship as *villæ et glebæ adscripti*, *i. e.* regardant bondmen or servants that by their sedulousness obliged their lords, and were often rewarded with advancement and put into farms under the tenure of certain rents and services, or uncertain rents and services, according to the degree of favour they could obtain. This is not in favour of the idea that the origin of copyholders was servile. Bracton calls copyholders *villanos sockmannos*, not because they were bond, but because they held by base tenure, by doing of villein services. Fleta calls them customary tenants. Littleton, in his notes to the second book of his 'History of Henry II.,' remarks that in the 'Domesday Book' the distinction is made between villeins who were affixed to a manor and others of a still lower and more servile condition, *viz.* *bordarii*, *cotarii*, and *servi*, and he quotes authorities to show that sometimes the word *villanus* signifies not a slave but a farmer inhabiting a village—*villanus*, a *villâ*, *quia in villâ habitavit*, et

*operibus rusticis plerumque sordidis exercebatur.* Glanvil (l. s.) says that *villanus* was a man regardant to a manor so as to go along with it whenever it changed its master, and in such base servitude that his person, children, and goods belonged to his master. Spelman agrees with Littleton's meaning of the word *villanus*, and describes *ceorls* (*villani*) as husbandmen who lived upon the outlands of the Saxon manors, and were customary tenants at the will of their lords, rendering unto them a portion of victuals and things necessary for hospitality. This rent or retribution they called *feorme*, whence farm or farmer. But this service, he adds, was no bondage, for the *ceorl* might as well leave his land at his will as the lord might put him out of it at his will. Gurdon traces copyholders to socmen, who, being entered on the rolls, petitioned to have copies, and thereby obtained a title. Mr. Hallam\* doubts whether it can be proved by any authority earlier than that of Glanvil, whose treatise was written in 1180, that the peasantry of England were reduced to that extreme debasement which our law-books call villenage, a condition which left them no civil rights with respect to their lords. For, by the laws of William the Conqueror, there was still a composition fixed for the murder of a villein or *ceorl*, the strongest proof of his being, as it was called, landworthy and possessing a rank in society. If Mr. Hallam be right in his doubt, clearly copyholders cannot seek their origin in serfdom, copyhold being known long before 1180. There is no disputing that actual base servitude prevailed in the thirteenth and subsequent centuries, and it is of course possible and probable that those slaves rose to be copyholders. There is indeed ample evidence of the manumission of many persons in the time of the Wars of the Roses, in order that they might serve as soldiers. Dr. Sullivan speaks of this in his 'Lectures,' and some, he states, were recovered when the kingdom was quiet under Henry VII. Actions were brought for their recovery, and frequently the masters were defeated. This doubtless is the period to which Lord Wynford refers in his judgment in *Garland v. Jekyll* (2 Bingham's Reports, 273), when he says, "The

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\* 'Middle Ages,' ii. 385.

statutes to which we refer with so much satisfaction have only secured the rights of men already free. It is to lawyers in Westminster Hall, and I speak it with pride, that slaves, for such was the state of men in pure villenage, are indebted for the permanency of their property, and for that right in society which permanency in property has conferred upon them; it is by the establishment of the customs referable to copyholds as established in courts of justice that this permanent interest has placed copyholders in the happy position in which they are now found." We think, therefore, that it must be agreed that whilst a certain section of copyholders of recent creation may have been and probably were originally—that is, subsequent to the time when Glanvil wrote—in a state of pure villenage or servitude, copyholders generally were the husbandmen of the Saxon period. But whatever their actual status, it must be allowed that both in the Saxon and Norman period they were so far subject to their lord's will that *eorum tenentes tempestive et intempestive pro voluntate domini possent resumī et revocari*.

Their actual condition.

Services.

We have referred to the incidents of fiefs which were continued under the Normans, but it is necessary that we should say something more concerning the services due from the tenant to the lord before we proceed to the jurisdiction of the lord's courts. They were either (1) free or (2) base. Under free services are to be placed (1) render, as to pay yearly a certain rent; (2) user, as when the lord reserved common for his cattle; (3) in *prender*, as when the lord reserved 3s. and four loads of estovers for fuel to be taken yearly in his tenant's grounds. Base service consisted of feascance, such as to scour the lord's ditches, tile his house, thatch his barns, &c. This division may be further divided into (1a) corporal, (2a) annual, and (3a) accidental services. Corporal services are of two sorts (1b) of submission, (2b) of profit; (1b) consisted of homage and fealty already noticed, (2b) were services either tending to the common weal, such as the repair of bridges and highways, or tending to the private profit of the lord, such as officiating as the lord's carver, butler, or brewer; (2a) annual services consisted almost wholly of the payment of rent; (3a) accidental services were incident to the fee and due without



any special reservation. The base services have diminished into mere form.

In connection with homage and fealty is suit of court. Every copyholder owed suit of court, but a freeman could not be distrained to do suit if not bound to do it by Suit of court. feoffment or prescription. Refusal on the part of the tenant was a sure cause of distraint (2 Inst. 118), and sometimes of forfeiture. A copyholder also was bound to pay rent, signifying a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. There were (1) rent service and (2) rents of assize. To the former was attached some feudal incident. The latter were the certain established rents of the freeholders and ancient copyholders of a manor which could not be departed from or varied. Services being all done away with except in some few manors (and there they are generally compounded for by Composition. payment of a double rent), it may suffice if we say Heriots. a few words only upon the nature of heriots—*herus dominus*—a duty appropriated to the lord. In the Saxon times it meant a tribute given to the lord for his better preparation for war. While tenures continued to be military and for life only, the arms, weapons, and war-horse of the tenant were the lord's upon the tenant's decease, and were given to the next succeeding tenant. They belonged to the lord, having been purchased out of the profits arising from the land. But when the feud became inheritable the reason of the heriot ceased, and then the arms, &c., went to the heir who succeeded to the land. Yet in some manors the custom of the heriot was by particular agreement retained, or the lord reserved it as a parcel of his tenure; and though originally the heriot was the best horse, yet in time it came to be the best beast, for the tenants, in order to disappoint their lord, would often sell their horses. Then of necessity a law was made that the lord might take the best beast in lieu of them, and so the heriot became to be esteemed the best beast ever afterwards. Heriots are due in three several ways: (1) by custom; (2) by tenure, which is called heriot service; and (3) by reservation or deeds executed within time of memory. Those by custom are most usual, and so tenacious was this custom that the bankruptcy of a copyholder

did not deprive the lord of his heriot, and it was also payable on the death of the tenant. The property immediately vested in the lord, and he could seize though he might not distrain for it. He could not, however, seize the beast of a stranger, and if the heriot were eloiigned, so that the lord could not seize, he might have his action against him who detained it.

We have now stated with sufficient particularity the grounds upon which the lord founded his rights, and the duties attaching to tenancy in manors, to enable us to proceed to review the jurisdiction of the manorial courts.

### III.—NATURE AND JURISDICTION OF MANORIAL COURTS.

Without going back to the days of the patriarchs, to whom we admittedly are much indebted for certain rudimentary notions of government, we may commence this section by stating that in the early days of Saxon rule, there being no common magistrates, jurisdiction attended land. The government of the manor or village was in the thane, but the judicial office being founded upon property, all who possessed lands freely had a share in the administration.

**Early Saxon rule.** The jurisdiction of the thane in his soke or manor was private or ordinary, without any authority derived from any commission, being an original jurisdiction arising out of the possession of land and men. The thane had the same functions to discharge in his soke which the king exercised in his grand seignior; but neither was absolute. The

**Thanes.** The king in his grand seignior determined by and with the advice of his thanes, as original sharers with him in the conquered lands; whilst the thane in the court of his soke or little seignior determined all differences between his tenants in their civil relations, assisted by those tenants, and also punished criminals with the advice and consent of his freemen. Life and death were originally within the jurisdiction of the thane's

**Seigniories.** hall-mote. The Saxon term hall-mote is partly taken from the Britons, who called a council or synod-mote or gemote. The British word for a little court was Comortha or Gamortha, which the Welsh used to denote any

**Hall-mote.**

temporal court less than the Hundred Court, as for instance the Court of Friburgh or Frank-pledge, by us now called Court Leet, where justice was done amongst the people of that jurisdiction.

The thane, the chief of the Saxon hall-mote, was a person of such high regard amongst the Saxons, that in the time of Alfred a law was made that such as com-  
Treason against the thane.  
 passed the death of the king or of his halford, lord or thane, should suffer death. The Saxon word halford swic (from *halford dominus et swic proditio*) implies that there was the crime of treason against the lords of sokes as well as against the king. Halford, strictly, is a giver of bread as maintenance, from whence the thanes or lords of manors giving and granting to their socmen land sufficient to maintain themselves and their families with bread and necessaries, were called halfords. By Alfred's law, and by the law of Canute, treason against the lord was declared unpardonable. Soon  
Division of treason.  
 after the time of Henry I. there grew up a distinction between treason against the king and against the lord, the one being high treason and the other petty treason.

The ancient thanes were remarkable for their hospitality, their freemen and others being very often entertained in their great halls, whither the residents  
Regular courts.  
 within the soke came at any time with their complaints, when they knew that the thane and his freemen were together. This custom being found inconvenient, the thanes appointed certain days in which they would hear complaints, that parties might be under no surprise, but come prepared to make their defence. In some large sokes a hall-mote was held once a week, and in the lesser sokes once every two, three, or four weeks. This uncertainty as to time of holding the hall-motes was afterwards regulated by the Legislature, Henry I. fixing them to be held once a fortnight and no oftener, Henry III. once in three weeks. Thus the lords of manors could not hold courts as often as they pleased, as the ancient thanes did. When lands escheated to the thane he frequently granted them to some of his residents in open hall-mote, with the consent of his freemen.

Although the lords of the seigniories had original jurisdiction, not bounded by any written laws, yet if the lords were exor-

bitant they were answerable in the king's court to their vassals and tenants for any injuries or wrongs done to them. And if the lords did not appear in the king's court to answer the tenant's complaint, the court adjudged that the tenants or vassals should do no service for their lands until he appeared to answer and abide by the judgment.

Lords answer-  
able in the  
king's courts.

The lords originally held most oppressive sway over their tenants. They took victuals and other necessities for furnishing their castles and households, and providing for the demands of hospitality, until compositions began to be made in Henry II's time. These compositions took the form of money payments and services, some tenants attending their lord on his journeys, whence they were called road-knights. The tenants were also forced to entertain their lords and followers at their houses, and that was called coshering. The lords exacted tollages, carriages, and many other matters from their tenants, and imprisoned them in their castles and held distresses there during pleasure, which exorbitances, as already mentioned, were in a great measure redressed by Magna Charta.

Road-knights.

Coshering.

As the Saxons divided the land amongst them, so did they divide the authority, the chief of every district acting as magistrate until time made things regular, and suitors had power to hear and determine without writs by warrant of Jurisdiction General.

Local magis-  
trates.

From Alfred's time criminals *contra pacem* were tried in the king's court called Town, Lathe, or Leet, and the thane had no cognizance of crimes *contra pacem* until succeeding kings granted a branch of the powers of their town or leet to some lords of manors, that they might, for the ease of the people, have the view of tenants and residents within their manors, which grant being obtained from the Crown at the charge of the lord of the manor at the instance and request of the tenants for their own ease and convenience, they freely agreed to make an annual payment to the lord in consideration of his charges. The leet had no jurisdiction over crimes but such as were of the Common Law. All these were punishable in the leet, and certain curious implements were

Criminal juris-  
diction.

kept for the purpose of carrying the sentences of the court into effect. The civil jurisdiction of the leet was very extensive, but it may be sufficient to state here that it embraced the surcharge of and encroachments on the common, and amercements. That originally the judges of this court were not very honest may be gleaned from the fact that thirty of them were hanged by King Alfred.<sup>f</sup>

The Saxon thane was by the Normans called baron; the Saxon hall-mote, court-baron; and the Saxon soke, manor. The great Normans who obtained the manors held and enjoyed with them the franchises, liberties, and privileges that the thanes had before them; they lost not an inch of them, and wherever possible arbitrarily extended each inch to an ell. The Saxon leet was by the Normans called frank-pledge, and the Norman lords tenaciously maintained all the rigour of its jurisdiction.

Barons, court-  
baron, manor.

The jurisdiction of the court-baron necessarily became two-fold, one original and ordinary, the other customary. The exercise of the latter caused a division of the court to be called the customary court.

Customary  
court.

In the former the freeholders, who received their appointment from the king, and the suitors were the judges; in the latter, the copyholders constituted the jury, and the lord or his steward was the judge. The court-baron was the pillar which supported the manor. Its entire jurisdiction embraced the amercements of tenants failing to attend the court, the assessment of the duties due to the lord on occasion of death or marriage, enforcement of payment of rent, and the settlement of cases of forfeiture and escheat. Also it was inquirable by the court if any which had common without number charged the common with more beasts than he ought to do—according to the quantity of his land—or if he which had common appendant, not common appurtenant, put into the common beasts which were not commonable, as hogs, goats, and geese; or if any digged in the common, unless for gravel for the highways (filling it again), or made other trespass in the common, or used the common in any other manner without the license of

<sup>f</sup> For full information see 'Scriven on Copyholds.' vol. ii.

the lord, except to take the common with the mouth of his cattle; or if any digged turf or made other trespass upon the waste, or built any house or made any inclosure of it. The court also inquired concerning the surcharging the common with beasts commonable in another manor, and ascertained who was tenant to the lord in case of alienation; inquired into pound-breach, trespass on the lord's demesnes, the removing of meerstones and stakes, and encroachments by burning or otherwise. Also, if any tenant inclosed any land which was wont to be open and kept it in severalty without the license of the lord and of the freeholders that was inquirable into, for it was well recognised that no tenant of the lordship should lose his common in that.

The court had a general jurisdiction over copyholders, enforcing custom, and punishing sub-letting for longer periods than was allowable by such custom.<sup>6</sup> Why the lord's court had no jurisdiction in copyholds is stated by C. J. Treby. The jurisdiction of the lord's court, he says, extends only to land holden of the manor, and not to land parcel of the manor; and copyholds are part of the demesnes. If, therefore, they were within the jurisdiction, or "triable" in the lord's court, he might be judge and party. But in the court-baron the lord had his action of debt, the suitors being the judges. In no court, however, might free tenants be distrained to answer concerning a freehold, nor anything belonging to a freehold, without the king's writ.

Process in the court-baron was by summons, attachment, and distress, which was the process at the Common Law.

Process. If a man were amerced he lost none of his honourable freehold, and if the lord, "of his own head," amerced any tenant or party in the court-baron without cause, the party might have a trespass if he were distrained for that amercement.

Remedies for  
amercement and  
ejectment. Littleton, indeed, says that in his time it was doubted whether the copyholder had any legal remedy against his lord; but in Edward IV.'s reign it came to be well established that, if the lord turned out his copyholder, he might as well maintain an action of ejectment

<sup>6</sup> 2 Salkeld, 186.

against him as a tenant for years could, or else might sue the lord in Equity to be restored.<sup>b</sup> It seems that in early times the court-baron had a criminal jurisdiction, for there is evidence that in 1285 executions for felony took place by its order. But in these cases the lord's privilege was called in question at the assizes and disallowed. It is very probable, however, that executions continued to occur in other manors where the jurisdiction was not disputed, or at least not appealed against. The disposition of the lords about that time appears from their application, at the Parliament of Merton Private prisons. in 1237, to be allowed their own private prisons. Happily the application was not granted.

The civil jurisdiction of the court-baron was rendered insignificant, not only by its limitation in personal suits to debts or damages not exceeding forty shillings, but also by the writs of *tolt* and *pone*, which at once removed a suit for lands in any stage of its progress before judgment into the county-court or the court of the king, and the statute of Marlbridge Statute of Marlbridge. took away all appellate jurisdiction of the superior lord for false judgment in the manorial court of his tenants. Another blow was thus struck at the feudal connection which we portrayed in our first section.<sup>1</sup>

We have given a reference whereby the general and particular jurisdiction of the court-leet may be ascertained, and it may be well here simply to add that the usual exhortation to the jury enjoined the preservation of peace and order within the manor. The court-leet we have stated was the old Saxon frank-pledge, and its original intent was to view the frank-pledge, that is, the freemen within the liberty, who, according to the Great Alfred, were all mutual pledges for the good behaviour of each other. Of these pledges the oldest or most respectable was called the head-borough or chief-pledge, and by some writers is supposed to have had the same authority with our constable.

It was necessary that the court-baron should be held within the precincts of the manor, and if held without those precincts its proceedings were void. It has, Holding the court-baron. however, been determined that, by special custom,

<sup>b</sup> As to the jurisdiction of the Courts of Equity, see 12 Cl. and Fin. 248.

<sup>1</sup> Hallam, 'Mid. Ag.' ii. 482. Kitchin on Courts.

the lord may hold a court within one manor for several manors, and this is very frequently practised. The lord's steward was but the registrar of this court, though it has been said that he was judge of matter of law. Two freeholders are sufficient to constitute this court.

The view of frank-pledge is now in total disuse, and the name only is preserved in the style of the courts. The Quarter Sessions, jurisdiction of the courts-leet has gradually devolved upon the Courts of Quarter Sessions, and in the present day they content themselves with little more than appointing their own officers within the precincts of the manor, independently of the parochial officers.

Another baronial court was the Court of Survey, generally held by a lord on the first taking possession of his manor, the better to inform himself of the real state and value of it, the number of tenants, and other circumstances. There was no peculiar jurisdiction or authority attaching to this court, but it has always been held with and considered as a branch of the before-mentioned courts.

#### IV.—REVIEW OF EARLY RELATIONS AND JURISDICTIONS.

We deem it advisable to sum up briefly what has been said concerning ancient rights and remedies existing in manors before we proceed to deal with rights which by custom attach to the uncultivated portions of manors spoken of as the lord's wastes, but which we shall henceforth refer to as common-land.

The feudal association was founded on a mutual contract. What the tenant gave to the lord in the shape of services was repaid to him in paternal protection, whereby property and its inheritors were placed under considerate and affectionate guardianship. This situation of parties was broken up by the unjust requirements of the superiors, and in the early Norman times the interests of lord and tenant clashed violently. Services were exacted with cruel strictness, and the consequences of *laches* on the part of the tenants were invariably enforced. When land was held by the sword it was almost vain for a tenant to appeal to the king. The lord was a local despot, and



a tenant might be certain that, if he appealed from a wrong committed by his superior, his tenancy, if no longer insecure, would be rendered hard and burthensome. Co-operation amongst the oppressed was in those days rare, and not until the barons themselves suffered from the pressure of feudal severities put into operation by a hand superior to their own, did they fully recognise the claims of the common people and the justice of their remonstrances. The barons and the people combined extorted from John the great charter of English liberties, by the light of which alone can a correct view be taken of modern class rights. But previous to that era, we notice the near rivalry between the freeholder and his lord. The lord was not judge in the court-baron—the supreme, the necessary court of every manor. His freeholders decided all suits between him and his tenants; yet there is reason to believe that in the days of baronial supremacy he reserved to himself a species of appellate jurisdiction, inasmuch as a statute was passed expressly to deprive him of the power of sitting as a court of appeal within his own manor. The freeholder did not owe suit of court by the Common Law. By stating this fact we establish his independence. The freeholder was as much lord of his freehold as the thane was lord of his soke. Whatever rights he claimed in other parts of the manor he claimed by virtue of his freehold interest; and this is plain, because an estate of freehold means such an estate as is worthy of a free-man—an estate for a man's own life. But here a power was reserved to the lord; he took the reversion. The freeholders objected to this, and by their influence they obtained the land held for their lives for their sons, and accordingly the holding of lands by feudal tenants became hereditary. Being hereditary they were alienated. Sub-infeudation lessened the power of the barons, and they procured a prohibition of the practice; but in progress of time each restriction was removed, until at the present day every man holding by fee-simple considers himself, although he is not, absolute lord of his own domain.

Reference to the early powers of freeholders led to this slight digression from our summary; but it confirms our idea of the considerable power of the freeholder. The copyholder was a different being. He was frequently turned out of

his tenement in order to compel him to petition his lord, and thereby to admit his low and dependent condition, as well as for the purpose of demonstrating to the world the lord's magnificence. If we consider copyholders as ranking with, as being, in fact, the ancient husbandmen or farmers, we shall understand that they were very necessary to the well-being of the lord's demesne, taking that expression in its widest sense. We have carefully traced the rise of copyholders, and with the purpose which we have in view it seems unnecessary to say more by way of review than that the copyholder at length (certainly by the time of Richard II.'s accession) established the permanency of his estate, and might appeal with confidence to the evidence of the court-rolls. He is distinguished from the freeholder by the difference in the nature of their interests. The copyholder's interest was customary; he had a customary interest in his house, and a customary interest in the lord's wastes. Consequently a copyholder's interest is regulated by the customs of each particular manor, which throughout England are various and diverse. In disposing of his estate the copyholder surrendered it into the hands of the lord, and the new tenant was "admitted" in the court of the manor. We have shown that the freeholder sub-infeudated his freehold even in opposition to his lord's desire.

The lord, on the other hand, could not impose a new landlord upon his tenants against their will by any ordinary process, for the tenant might refuse to attorn. The sole recourse the lord possessed was to the expensive operation of a fine. When rights were no longer arbitrary the lord could only resume possession of his tenants' land by reason of forfeiture or escheat, both of which were adjudged by the court of the freeholders. His remedy in other respects was by distress, and for the wrongful exercise of this process the tenant had his legal remedy—the freeholder, his writ of *assize*; the copyholder, his action on the case.

We conceive that we may therefore conclude in all fairness, and with every regard to the authorities which we have cited, that in the eye of the Common and Customary Law the rights of the lord and the tenants in the lands of a manor were equally balanced, *absque*

Balance of  
rights.

*hoc*, that the soil of the manor was the absolute property of the lord. Indeed the tenants would appear to have obtained the loftier jurisdiction and power over the manorial land by virtue of their judicial functions, exercising, as the freeholders did in the court-baron, the joint powers of judge and jury; exercising, as the copyholders did in the customary-court, the offices of jurymen, under the direction of the lord or his steward.

Having thus summarized the position of the fundamental rights of lords and their respective tenants, we shall proceed to discuss them in reference to common or waste land.

#### V.—RIGHTS ATTACHING TO COMMON LAND.

We have shown, at the outset of this Essay, that when land was divided by the chief, a portion was left uncultivated. The grants were so large that after the lord had marked out his demesne and every tenant had his allotment, there invariably remained a surplus. There was no foreign market to offer an inducement to cultivate every inch of soil, and so many of the Britons had fled that there were not sufficient people to consume the product of all the land. Therefore this surplus was left uncultivated and neglected—common to all the inhabitants of the captain's village or street, but yet remaining the captain's property. The inhabitants used it by license from the lord or captain. They built erections for dwelling in upon their lands, raised fences for a protection or a boundary to their property, and cultivated, probably, the entirety of their ground for the maintenance of their families. The use of the waste was allowed to extend to common of pasture, turbary, estovers of house-bote, hay-bote, fire-bote, and plow-bote. The usage of the farmers in tract of time became a customary right which the farmers claimed, and which the thanes allowed.

Common of pasture is the great right to which the most importance has ever been attached, and there is every reason to suppose that common is derived from *communitate*, as signifying the community or number of people who used common of pasture, or the number

Markets.  
Population.

Surplus land.

Extent of user  
of waste.

Common of  
Pasture.  
Derivation.

of beasts that participated of the herbage. Budæus called such common *compascuum*, viz. a place where several men's beasts fed in community. Lords of manors, in many cases, extended this privilege to other beasts than such as were necessary for the ends of husbandry (which latter only are considered commonable), as to hogs, goats, and the like, or restrained it to a particular species of cattle. They allowed the occupiers of lands in other lordships to have a *profit à prendre* in their wastes, or annexed a right to a house and land jointly—all which qualifications are in direct opposition to appendancy<sup>k</sup>—

Common appurtenant.

and hence the prolific nature of common appurtenant. A grant of common was also made to a man and his heirs by deed. Thus an inheritance was created distinct from any other rights. The right was in gross, or generally. It arose from no connection of tenure, and might have been vested in one who had not a foot of ground in the manor wherein it was claimed, or in any other.<sup>l</sup> Another

Pur cause de vicinage.

species of common about which it is important to make an introductory and elementary remark is common because of vicinage. It arose where the inhabitants of two townships or vills intercommoned in wastes contiguous to each other, so that the cattle of either respectively strayed into the pastures belonging severally to each. It has been long settled that such a custom is only an excuse for a trespass, and that the law winks at it to prevent suits in a champaign country.

Before proceeding into detail concerning rights of common, we may well observe the first information which we have concerning approvement or inclosure of waste land, which seems to have been contemporaneous with the increase of population. A greater quantity of land was required for the purpose of maintenance, and the tenants themselves petitioned the thanes to grant to them parts of the wastes, to be approved and put into severalty. The thane acquiesced; and in making the grant he met with no obstruction from the commoners generally, so far as we know. Indeed, the immense tracts of waste land which lay uncul-

Approvement.

Extent of wastes.

<sup>k</sup> Woolrych, 16.

<sup>l</sup> 2 Bl. Com. 34.

tivated in those times caused the effect of inclosure of small portions immediately adjacent to houses to be scarcely perceptible. The extent of waste land originally may be gleaned from the large number of Inclosure Acts which have been passed during the last century. There was, moreover, no Saxon law to prohibit the thanes from Saxon law.

granting parts of their wastes to be held in severalty, yet they exercised the power with such considerate and judicious moderation that they rarely failed to obtain the consent of their tenants, which was generally sought and granted at the hall-mote, and the terms (*i.e.* the rents and services reserved to the lord) were entered in the thane's book. The Normans abused this power of approvement, as they Norman abuse. abused the relationships which had proved mutually beneficial in the early feudal era. Markets opened abroad, the people increased, and the greedy eye of the barons saw that the wastes might be approved to good account. Knowing that the Saxon law offered no impediment, they set about approving commons so immoderately, that great contests arose between lords of manors and their tenants, many suits were taken into the county-courts, and frequent appeals were carried thence to the king's court by writ of false judgment. This necessitated the Statute of Merton.

*Argumentum a divisione est fortissimum in jure.* There are but four principal rights of common—of pasture, of estovers, of turbary, and of piscary. There are also Rights of common. but four manners of commons—*i.e.* common appendant, appurtenant, in gross, and by reason of vicinage, but this latter attaches alone to common of pasture. Mention may be made of another apparent species of common, *viz.* common by reason of commonancy and residence; but it is stated in *Gateward's Case* (6 Rep. 60) that it is no common at all, the argument being that one who has but a transitory interest in his house has but a transitory interest in the common.

The exercise of these rights is regulated by custom, from which, indeed, they derive their force. Custom Custom. must be certain and reasonable, and the question whether a particular custom complies with these requirements is for the court. One or two instances of a valid custom may be

noticed at the outset. In *Hoskins v. Robins*, 2 Wms. Saund. 324, the customary tenants of a manor alleged a custom to have the sole and several pasture in the soil of the lord for the whole year and thus exclude the lord, and it was upheld. To go to the other extreme, in *Gibson v. Spurrier*, Peake's Ad. Cas. 49, the concealment of a right to exercise common on an inclosed estate every third year was held a fatal defect in a contract for its sale.

Where pasture for cattle is allowed throughout the year, this is called common without stint, otherwise, the common is said to be stinted. Again, there is common without number, which, when appendant or appurtenant to a tenement, means a right of depasturing for so many cattle as are *levant* and *couchant* thereon. What this means we may learn from decided cases. In *Cheeseman v. Hardman*, 1 B. and A. 706, which was an action for disturbance of a right of common, a claim for all the plaintiff's cattle *levant* and *couchant* on his land was supported by evidence of a custom for all the occupiers of a large common field to turn cattle into the whole field when the corn was taken off, the number of cattle being regulated by the extent, and not the produce, of each man's land in the field, although the cattle were not actually maintained on such land during the winter. In *Mainfold v. Pennington*, 4 B. and C. 161, the plaintiff claimed a right for all his commonable cattle *levant* and *couchant*, and the proof was that he had turned out all the cattle he kept, but had never kept sheep. It was held that this was evidence to go to the jury of the right as laid. *Willis v. Ward*, 2 Chitty's Rep. 297, is an authority to the effect that an allegation of right of common for all the plaintiff's cattle *levant* and *couchant* is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time. And lastly, *Doidge v. Carpenter*, 6 M. and S. 47, decides that an allegation of a right of common for all commonable cattle *levant* and *couchant* is proved by a grant of "reasonable common of pasture." The expression "*levant* and *couchant*" seems originally to have meant the abode of a single night (in which sense it was frequently used—*Poole v. Longueville*, 2 Wms. Saund. 289); but it has come to imply

the probability of that abode being perpetual, and refers to the possession of such land as will keep the cattle claimed to be commoned during the winter.<sup>m</sup> Common in gross means a right for an unlimited number of cattle, provided <sup>Common in gross.</sup> sufficient herbage remain to satisfy the requirements of the lord and other commoners having rights upon the same land.

Comyn's Digest, tit. Common B., says that common appendant (being the Common Law right of every free tenant of a manor on the lord's waste) is confined to such and so many cattle as the tenant has occasion for, to plough and manure his land in proportion to the quantity thereof. This opinion is old and authoritative. Lord Coke<sup>n</sup> says that when a lord of a manor did enfeof others of some parcels of arable lands, the feoffees, *ad manutenendum servitium socæ*, should have common in the said wastes of the lord for two causes; first, as incident to the feoffment, for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, and, by consequence, the tenant should have common in the wastes of the lord for his beasts which do plough and manure his tenancy as appendant to his tenancy, and this was the beginning of common appendant. There is, however, a difference of opinion concerning the title of *all* tenants to this right, the Court of Queen's Bench holding that there is no Common Law right of tenants of a manor to common on the waste.<sup>o</sup> "But," says Mr. Joshua Williams, "in the humble opinion of the author, the authorities cited by that court <sup>The law of real property.</sup> tend to the opposite conclusion."<sup>p</sup> (*Infra*, p 188).

Strictly, common appendant is confined to arable land; but the law has conceived it beneficial to intend all land to have been originally arable, and this intendment was still adhered to, although a man built a house on the land formerly arable, or converted part of it into pasture or meadow (*Tyrringham's Case*, 4 Rep. 37). Later, it was held that common might be appendant to a cottage (*Emerton v. Selby*, 2 Lord Raym. 1015).

<sup>m</sup> *Patrick v. Lowe*, 1 Vent. 54, 2 Brownl. 101; *Leach v. Wideley*, 5 T. R. 46; *Scholes v. Hargreaves*, 1 Wms. Saund. 28, n. 4.

<sup>n</sup> 2 Inst. 85.

<sup>o</sup> *Lord Dunraven v. Llewellyn*, 15 Q. B. 791.

<sup>p</sup> 'Real Property,' 7th ed. 110 note j.

Common by reason of neighbourhood or vicinage, excused, as we have said, a trespass. Beasts were not *put* by certain persons to common in adjacent land, but they escaped, and the trespass committed was winked at, being for the mutual advantage. The intercommoning was contemporaneous, otherwise the common was not common of vicinage.

Common of vicinage.

Excuse of trespass.

Common appurtenant is the most amplified description of common that can be legally enjoyed. It does not arise from any connection of tenure, may be claimed in respect of lands in another lordship than that in which the waste is situate, and a title to it may grow out of the occupation of any sort of land; it is commonable by all animals, may commence by grant within time of memory, and may be severed from the land to which it is appurtenant. In all these respects it differs from common appendant. Without making what would necessarily be a lengthened reference to the conflict of old decisions, it may be said generally that a man may prescribe to have common appurtenant for cattle *levant* and *couchant* upon a messuage, for it will be contended that a curtilage was belonging to the house. But it is also clear and agreed that houses newly erected cannot have this right of common where it is claimed by prescription, although, in the case where this point was decided, it was admitted that estovers might be used to rebuild an old chimney, and that if one should build a new house upon the foundation of an old house having this right, the right remained. When, however, the number of cattle depasturing is unlimited, and so subject to the rule of *levancy* and *couchancy*, it is absolutely necessary to prescribe in respect of land.

We will now draw the distinction between common appurtenant and common in gross. For common appurtenant a man shows his seisin in fee of the land to which he claims his common, and then says that he, and all those whose estate he has in the land, from time whereof, &c., have had common of pasture in the land where, &c., for his cattle *levant* and *couchant* on the land to which, &c.; but the prescription for common in gross is where one does not lay seisin of any land, but says that he and all his ancestors, whose

Distinctions.



heir he is, from time whereof, &c., have had common in the land where, &c., for all their cattle without relation to any land, and without saying *levant* and *couchant*, because there is no land upon which they can be *levant* and *couchant*, or to which the common can be appurtenant.

Thus broadly stated, subject to limitations and restrictions which are matter of evidence in individual cases, we see the principal rights attaching to waste land which it is necessary that we should notice. Common of estovers and common of piscary, as well as common of turbary, have each their peculiar customs, but they follow in the main the rules of law which govern common of pasture, being appendant, appurtenant, and in gross, but not *pur cause de vicinage*. Summary.

Postponing for a while the consideration of approvement under the statute, and by custom, and the modern law of inclosure, we will examine the existing relations between lords, their tenants, and the public, with reference to their respective rights and duties upon waste lands.

We have already remarked that in different manors there are different customs by which Common Law rights and rights the growth of custom are regulated. Clearly, therefore, we can here deal only with plain, prominent, and general principles. General principles. When it is considered that for many centuries no manors have been created, and that rights derived from custom are necessarily of ancient origin, we shall see that, apart from the question of approvement and inclosure, which we have postponed, the altered circumstances of modern times do not affect the fundamental manorial rights whether of lord or of tenant. All that an alteration of circumstances can possibly effect is to introduce, perhaps, a modified reading of old law, such as we meet with in the case of *Lord Dunraven v. Llewellyn* (*ubi sup.*) where Parke, B. says, "although there are some books which state that common appendant is of common-right, and that common appendant is the Common Law right of every free tenant on the lord's wastes (for example, 1 Wms. Saund. 346 d. note l., and *Barrett v. Reeves*, Willes, 231), it is not to be understood that every tenant of a manor has by the Common Law such a right, Title.

but only that certain tenants have such a right, not by prescription, but as a right by Common Law incident to the grant." Mr. Joshua Williams differs from this view without stating his reason. To enter upon a field of inquiry which Mr. Williams has not thought fit to occupy, to conjecture what his arguments might have been, and to venture to arbitrate between his views and those of Lord Wensleydale, would be an unnecessary and unpardonable act of presumption upon our part. Copyholders have a customary interest, and therefore a customary right of common on the wastes. If copyholders claim common in another manor they must prescribe for it in the name of their lord (*Forston's Case*, 4 *Reps.* 31). In this case a distinction is drawn between prescription which is personal, and custom which is local. The latter serves those (such as the inhabitants of a town) who cannot prescribe in their own names or in the names of any other persons certain. There is also usage, which is a right in virtue of possession, and may belong either to persons or places. With regard to prescription we have a modern Act of Parliament (2 and 3 Will. IV. c. 71), which enacts by its first section that no claim which may be lawfully made at Common Law by custom, prescription, or grant, to a right of common, or other *profit or benefit from or upon the land of another*, except tithes, &c. shall, where such right shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated by showing only that such right, &c. was first enjoyed at any time prior to such period; and, where such right shall have been enjoyed for sixty years, it shall be deemed absolute and indefeasible, unless it shall appear that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. To enable a stranger to common in waste lands there must be a grant from the lord *by deed*, and where an individual has enjoyed a right time out of mind without being able to trace the origin or foundation of his right a grant is presumed;\* and a right granted to a stranger upon land within the manor must be exercised according to the custom of the manor. The law

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\* 5 T. R. 414.

restrains the lord from making grants injurious to existing rights, it being decided that a right of common cannot be altered without the consent of all parties concerned.<sup>a</sup>

We have, therefore, the following classes of persons who may enjoy rights of common in the wastes of a manor:—Free tenants by virtue of their Common Commoners  
classified. Law right, or whatever right may eventually be allowed by conflicting opinion; copyholders and those who claim by grant, prescription, or usage. The custom of the manor reigns supreme over the wastes of the manor and regulates the user of their rights by these classes of commoners. Custom has not always pleased either lord or tenant. The right of the commoner has often been made subservient to an inconvenient right of the lord in the soil, whereby he has dug clay-pits, or empowered others to do so, without leaving sufficient herbage for the commoners. This right prevails if it can be proved to have been *always* exercised by the lord.<sup>b</sup> In another case,<sup>c</sup> the custom claimed by the lord utterly destroyed the rights of the commoners; but the commoners pulled down an entire fence for the purpose of exercising the customary right as claimed, and they were held justified.<sup>d</sup> Again, it is decided that, if a lord make a hedge round a common, or do any other act that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself in;<sup>e</sup> but if he can get at the common and enjoy it to a certain extent, and his right be merely abridged by the exercise of the customary right claimed by the lord, in that case his remedy is by action on the case or by an assize, and he cannot assert his right by any act of his own.<sup>f</sup> These decisions are based upon the principle that custom must be reasonable, and in one instance, where a right wholly inconsistent with common-right was allowed to prevail, the common-right had *never* been exercised, the lord's right *always*. In the latter case, to which reference is made, it was held that a custom for the lord to

<sup>a</sup> *Burges et al. v. Curwin et al.*

<sup>b</sup> 34 L. J. C. P. 222.

<sup>c</sup> *Bateson v. Green*, 4 T. B. 411.

<sup>d</sup> *Arlett v. Ellis*.

<sup>e</sup> *Rex v. Wyvill*, 7 Mod. 286.

<sup>f</sup> *Mason v. Cesar*, 2 Mod. 65; *Cooper v. Marshall*, 1 Ban. 265; *Sadgrove v. Kerby*, 6 T. R. 483; *Badger v. Ford*, 3 B. and A. 153.

grant leases of the waste without restriction is bad in point of law. Lord Tenterden (C. J. Abbott) remarked—"I think it is too much to suppose a reservation of a power by the lord at the time of the original grant, the effect of which would be to annihilate the right of common altogether. Such a common-right cannot exist."

What rights it is lawful for the lord now to reserve, and the inclination of the courts in construing reservations, we fully learn from a case recently decided in the Court of Exchequer.\* The Act upon which this case turned recited that Sir James Graham, as lord of the manor, was owner of the soil, and entitled to manorial and other rights, royalties, liberties, and privileges in certain land to be inclosed; that one-twelfth part was to be allotted to the lord in lieu of and as full compensation for all his right and interest as lord of the manor in the soil of the residue, the residue to be allotted to allottees, and to be freehold to all intents and purposes. It will appear, at a later period, that the compensation under the Inclosure Acts operates as a bar and satisfaction of the rights incident to the ownership of the soil; the right of taking game by hunting and shooting was one of the rights of that ownership. The Act in the case treated minerals as a separate tenement from the surface, and enacted that the right to the land should be in the lord, with liberty to work, making compensation for the damage to the surface. Then, the saving clause enacted that nothing therein should lessen the right of the lord to any seigniories, royalties, rights, or services incident to the manor, but that the lord should enjoy the same, and all rents, services, fines, forfeitures, courts-leet, and minerals, with power of winning the same, and also the right of hunting, shooting, fishing, and fowling over every part of the allotment, and all other rights, except as barred by the Act, in as ample a manner as if the Act had not passed. It is important to construe these words correctly, and Erle, J., does it thus:—"The plain meaning of this clause is to save to the lord rights incident to the manor over freeholds within the manor, if such were existing when the Act passed; and no construction is sug-

Rights reserved  
to the lord.

\* *Graham v. Ewart*, 26 L. J. Ex. 97.

gested by which it could operate as a grant by the allottees to the lord of the property in every beast, bird, and fish in their allotments, which might be the object of hunting, fishing, and fowling, with liberty to the lord to pursue them at all times into cultivated inclosures as freely as the lord had done over his own wastes. . . . . The Act is clear in compensating the lord for the ownership of the soil which he gives up, and, in vesting the soil so given up as a freehold to all intents in the allottees, subject only to the clause enacting that the lord shall have the minerals with the right of working, making compensation, &c. It is clear from the Act and the case that the lord was willing to have the right of sporting over the allotments, but I can discover no legal reason for assuming that the allottees intended to grant such a right." Mr. Justice Erle then cited *Greathed v. Morley*, where it was decided that a saving clause similar to the one in this case had no operation to create any right, but only saved those incorporeal rights which were incident to the manor when the Act passed; and *Doe d. Lowes v. Davidson*,<sup>h</sup> in which the Court were of opinion that the words, "in as ample a manner as if the Act had not been made" in a saving clause cannot confer any new right, but reserve only such as the lord had before. Further on in his judgment, he says:—"A right of free-warren is very rare, and where it exists it is still more rare to find it exercised to the full extent; and it seems more reasonable to suppose that a right of sporting whenever he chose was granted, the extent of which would be familiarly known, rather than an exclusive right which is unknown as an estate at Common Law, and has scarcely been heard of as a creation by statute which would give a power of oppression to the lord without any compensating good to the allottees."

Mr. Justice Willes agreed with those views; Mr. Justice Coleridge differed. The latter thought it was abundantly clear from the words of the Act—"and all other seigniories, royalties, and privileges to the lords of the said manor incident or belonging"—that mineral rights and sporting rights were considered by the former as being within the same category, and

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<sup>h</sup> 2 M. and S. 175.

both as seigniorial incidents of the lordship of the manor." And his conclusion was, that the proviso saved to the lord a right of hunting, shooting, fishing, and fowling over the allotment in question, and that that right was exclusive as before the Act passed, the object of the proviso being to preserve the former right unimpaired by the consequences of the inclosure. Wightman, Cresswell, Williams, Crompton, and Crowder, JJ., concurred with Coleridge, J., that Sir James Graham was entitled, under the Inclosure Act, to an exclusive right of sporting over the allotment.

The opinions of the late Chief-Justice of the Common Pleas and of Mr. Justice Willes are regarded with the greatest deference by the whole bench and bar, but they were in this case terribly outnumbered by their colleagues, also judges whose opinion is highly respected. We have now no reason to expect that the views of the late Chief-Justice and Willes, J., will ever be recognised. The House of Lords (Lords Campbell, Brougham, Cranworth, and Wensleydale) was unanimous against them. Lord Campbell (Lord-Chancellor) said that the right in question was an interest in the realty well known to the law. The property in animals *feræ naturæ* belonged to the owner of the soil where they were found at the time, and he might grant to others the right to come on his land to take them. . . . . It had been contended that the clause of the Act contended for [the purpose of preserving the rights] referred to such rights as were incident to the manor, but that was not so, for it reserved some rights as to mines, which were clearly not manorial rights. . . . . The language there [in *Greathed v. Morley*] was strictly confined to manorial easements; but here there was an absolute, unqualified, and express reservation of the right of hunting, shooting, and fowling. For that reason the judgment of the Court below was affirmed.

We shall say more, in our next section, upon the present effect of the old statutes, and it seems necessary to add in this place these few observations: *viz.* so long as a common remains open, the rights of lords and commoners are regulated by the common, customary, and prescription law; when it is inclosed by Act of Parliament, which is now the general mode, the rights attaching to it are

Rights on open  
and inclosed  
commons.

regulated by the provisions of that Act, the construction of which, as appears by the case above cited, is entirely for the courts of law. The strict adherence of the courts to the principles of law in these cases we know. In *The Bailiffs of Godmanchester v. Phillips* (5 B. and Ad.) the Court held that an award by Inclosure Commissioners must have a *strictly legal foundation*, notwithstanding the lapse of time and the conclusiveness of the award. The courts also attended closely to the spirit of an Act, as proved by a case in 2 Chitty's *Reports*.<sup>1</sup> It was provided that the commoners of inclosed lands should be entitled to herbage on the side of the road, as the commissioners should award; and they permitted the surveyor of highways to put up the grass to auction annually, and to agree with the highest bidder, being an inhabitant of the township. The Court considered that the power was ill-executed in this way, for the statute intended that the commoners should benefit by the herbage, which was impossible when the profits were exclusively vested in one individual. The spirit of the Act, it was said, must be strictly complied with.

Construction of Acts.

Spirit of Act.

## VI.—THE PRINCIPLES OF PAST AND FUTURE LEGISLATION.

The principles upon which Parliament has acted in framing particular statutes may invariably be gleaned from the preamble in each case. Should this source by any possibility fail, or should further evidence be required, recourse may be had to contemporaneous history, to parliamentary debates where they have been preserved, to the reports of commissioners appointed by the Crown, or to cases decided in the courts of law and equity. We have referred to the contests between lords and commoners which are matter of history, and the intrinsic evidence of the statute of Merton confirms the belief that it grew out of those contests. Because, says the preamble, "many great men in England which have enfeoffed knights and their freeholders of small

Preambles.

History.

Debates.

Law reports.

Statute of Merton.

<sup>1</sup> *Raines v. Robinson*, 501.

tenements in their great manors, have complained that they cannot make profit of the residue of their manors, as of wastes, woods, and pastures; and whereas the same feoffees have sufficient pasture, such as belongeth to their tenements, it is provided and granted" that the feoffors might approve the common of pasture (*i. e.* appendant and appurtenant), leaving sufficient common for the commoners, with ingress and egress, so that the lord might make the profit which he desired. The

*Its principle.* principle of the enactment is clear. The commoners could not consume more than a certain and limited quantity of pasture upon the wastes; and the lord had a Common Law right to approve, subject to custom. Parliament saw no reason why custom should be unreasonable upon the part of the tenants or commoners, and passed the enactment to establish a right not admitted by the Common Law.\* The lord's right was defined,—the full exercise of the rights of common was not abridged, nor were the interests of the commoners affected in the least degree.

The principle of the enlarging statute, West. 2,<sup>1</sup> is equally clear, for it recites that in the statute of Merton no mention was made of approvments between neighbour and neighbour, and that by reason of a doubt whether that statute applied only to lord and tenant, many lords of wastes, woods, and pastures had been hindered from making approvments by the contradiction of neighbours, though they had sufficient pastures; the statute of Merton was therefore declared to extend not only to the lord's tenants, but also to neighbours. This is so simple as to require no comment.

We will presently consider the legal effect of these statutes (confirmed by 3 and 4 E. VI. c. 3) in the present day. Before doing so we will look at the spirit of recent Inclosure Acts. It is very obvious that they owe much of their complexion to the reports of commissioners appointed "to inquire into the state and condition of the woods, forests, and land revenues of the Crown, and to sell or alienate fee-farm and other unimproveable rent." It was the decided opinion of these

Modern Inclosure Acts.

The reports of Crown Commissioners.

\* See sect. vii. *infra*.

<sup>1</sup> 13 West. 2.



commissioners, that direct Government interference with the lands of private proprietors was mischievous. In their third report they say that the land was safest in the hands of the proprietors, and that the interference of Government further than in the protection of property is always submitted to with reluctance, often evaded, and seldom productive of any benefit to the public. The Crown made ill-defined grants in the forests, and a confused mixture of rights was the consequence. This has been recognised more or less in all inclosure proceedings. The primary object of the commissioners was to promote the growth of timber for the supply of the navy, and with this important project in their minds, it is remarkable with what strict equity they treated all private rights in the forests. They proposed, for instance (pp. 42-44), that allotments should be made to commoners and the Crown, and that those who had the right of common of herbage should have a "clear, full, unmixed and undisputed right" to the parts allotted to them *for the whole year*, instead of a right to a *share* of the pastures, in common with the deer, *for six months only*. This recommendation, indeed, evidences a strong tendency to legislate most liberally with regard to common-rights; for it appears, that the rights of common which private estates within the perambulation of a forest had in the lands of the Crown, were formerly considered as no more than a fair compensation for the forest-rights which the Crown had over those estates; and accordingly, when lands were disafforested, as the private estates were thereby freed from the charge and burden of the forest-laws and the haunt of the king's deer, they were at the same time deprived of their right of common in the forest,—but if the forest was re-afforested the rights revived. Notwithstanding this, in full view of the benefit already accruing to the commoners, the commissioners proposed to consolidate their rights, and extend them from a share during six months to user during the whole year. Some early Acts (noticed in Woolrych, ch. xv.) did indeed abridge commoners' rights, and in some few cases take them away entirely, but this has not been the principle by which Parliament has been guided, more particularly in later years.

Their opinion.

The supply of timber.

Compensation to commoners.

The Acts of 29 and 31 Geo. II. had in view the inclosure of lands unfit for tillage or pasture, for the growth of timber, by and with the assent of the major part in number and value of the owners and occupiers of tenements to which the right of common belonged, and of the owners. Provision was made for the recompense of persons within and without the parish who had rights of common. Some benefits arose under these Acts, but the great difficulty lay in obtaining the necessary assents. We pass on to a far more important statute—13 Geo. III. c. 81—the preamble of which runs thus: “Whereas there are in several parishes in this kingdom several wastes and commons, and several open common fields, which, by reason of the different interests which the several landowners and occupiers, or persons having right of common, have in such wastes and common fields, cannot be improved, cultivated, or enjoyed to such great advantage for the owners and occupiers thereof and persons having right of common, as they might be and are capable of, if an improved course of husbandry were to be pursued respecting such open and common fields in each parish respectively, and such wastes or common of pasture were to be properly drained or otherwise amended.” This Act had in view the improvement of land by the introduction of agricultural science into the cultivation of wastes adjoining cultivated ground, and an extensive and efficient system of drainage. The spirit of the Act is not, however, to be gleaned entirely from the preamble. That portion of a statute teaches us what it was passed to remedy or to attempt to remedy. The sections themselves must be consulted to show the real temper of the Legislature towards rights attaching to the main object of legislation.

Aim of the Act.

Provision in favour of common rights.

Sect. 8.

Section 8 of the Act at present under notice, for instance, “provided always, nevertheless, that nothing in this Act contained shall be construed to extend to exclude any cottager or other person or persons whomsoever having right of common, and having no land in any of the said common fields, from having and enjoying his or their right of common in as full and ample a manner as he could and might have enjoyed the same before the passing of this Act, unless a composition be agreed to in writing,” as

provided by the Act. The ninth section provided, that if sufficient common be set apart for non-assenting commoners, the rest may be inclosed. Section 14 <sup>Sect. 14.</sup> empowered lords of manors to demise or lease one-twelfth part of the waste with consent of three-fourths of the persons having right of common, such consent to be given at a meeting to be held after fourteen days' notice; and such demise or lease to be for not longer than four years, at the best and most improved yearly rent that could by public auction be got for the same, the clear net rents reserved by any such lease to be applied to draining, fencing, and improving the residue of the common. What ample compensation is here given to the commoners for the loss of one-twelfth part of the waste! Could any evidence prove more clearly the solicitude of the Legislature concerning these old incorporeal rights? We think not. Sections 16, 17, and 18 refer to stinted pastures <sup>Sects. 16, 17, 18.</sup> on commons and common pastures occasionally closed, and empowered two-thirds of the commoners, with the consent of the lord, to direct the opening and shutting of common pastures for certain periods. By section 19, persons not agreeing were to have a portion set apart for them, and section 20 allowed persons having right of common to depasture sheep instead of cattle.

The Act next in order is the General Inclosure Act (41 Geo. III. c. 109), the effect of which was to bring private <sup>The General Inclosure Act.</sup> Inclosure Acts under general regulations applicable to all. By section 40 all the rights of the lord <sup>Sect. 40.</sup> were reserved except those intended to be barred by the Act. An appeal also lay from the decision of the commissioners to the Quarter Sessions, whose judgment was made final. <sup>Appeal.</sup>

6 and 7 Wm. IV. c. 115 is an important enactment and gives ample evidence of the spirit of the then legislation. "Whereas," says the preamble, "there are in many <sup>6 & 7 Wm. IV. c. 115.</sup> parishes, townships, and places in England and Wales divers open and common, arable, meadow and pasture lands, and fields, and the lands of the several proprietors of the same are frequently very much intermixed and dispersed, and it would tend to the im-

<sup>Intermixed rights.</sup>

proved cultivation and occupation of all the aforesaid lands within such parishes, townships and places, and be otherwise advantageous to the proprietors thereof and persons interested therein, if they were enabled by a general law to divide and inclose the same." Thereupon the statute enacts that it shall

Two-third  
parts may be  
inclosed.  
Sect. 20.

should be

What to be  
deemed ancient  
inclosures.  
Commissioners  
may be dis-  
penssed with.  
Sect. 55.

be lawful for two-third parts in number and value to inclose, with certain provisoes as to consent. Section 20 provided that all encroachments or intakes within twenty years preceding the date of the agreement should be divided and allotted as if lying open. Section 22 rendered lands inclosed more than twenty years equivalent to ancient inclosures.<sup>m</sup> These proceedings, namely of division, allotment, and compensation, were to be taken by commissioners, but section 40 provided that upon the consent of seven-eighths being obtained the inclosure might take place without the intervention of commissioners. Section 55 is an important section respecting commons near London and other cities and large towns:—"Provided always that nothing in this Act contained shall authorise the inclosure of any open or common arable fields, or any open or common meadow or pasture lands or fields, situate and being within ten miles of the city of London, or of any open or common, meadow or pasture lands or fields situate and being within one mile of any city or town of 5000 inhabitants, or within one mile and a half of any city or town of 15,000 inhabitants"—two miles, of 30,000, two and a half, of 70,000, three, of 100,000, to be measured in a direct line from the town-hall, or cathedral, or market-place. The powers of this Act were extended by a statute of the present reign (3 and 4 Vic. c. 31) to lands commonable during part of the year only.

Commons in  
the neighbour-  
hood of London  
and other popu-  
lous places.

8 and 9 Vic. c. 118 is the well-known extensive Inclosure Act of 1845, and its preamble states that "it is expedient to facilitate the inclosure and improvement of commons and other lands, now subject to rights of property, which obstruct cultivation and the productive employ-

The Act of  
1845.

<sup>m</sup> The result is that these lands cannot be made the subject of distribution, and are quite independent of the Act. | 1 Esp. 460, *Doe d. Colclough v. Mulliner*.  
See *Bryan d. Child v. Wenwood*, 1 Taunt. 208.

ment of labour." Section 12 is important for our present purpose. Thereby the inclosure of wastes of manors and lands subject to indefinite common-rights at all times is prohibited, unless the sanction of Parliament be previously obtained. This section is explained by Mr. Wingrove Cooke thus:—The distinction was

Sect. 12.  
Where consent  
of Parliament  
necessary.

that all lands upon which several rights might attach might be inclosed by the authority of the commissioners; waste lands upon which there are no severalty rights are reserved for Parliament. But by the fifth Amendment Act, 15 and 16 Vic. c. 79. s. 1, no land shall be inclosed without the previous authority of Parliament in each particular case. By section 15,

village greens are not to be inclosed, but provision may be made for preserving the surface and fixing boundaries. The 12th section of the eighth Amendment Act, gives a summary remedy for injurious trespasses upon village greens. By section 27 provision is made to the

Village greens.

advantage of the proprietors, for the benefit of those requiring exercise and recreation, and for the advantage of the labouring poor. "If on the report

Public exercise  
and recreation.  
The poor.

of the assessment commissioners, or after any further inquiries they shall think necessary in relation thereto, the commissioners shall be of opinion—having regard as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be

The inhabitants  
of cities and  
towns.

inclosed or any part thereof shall be situate, as to the advantage of the proprietors of the land to which such application shall relate—that the proposed inclosure would be expedient, the commissioners by provisional order under their seal shall set forth the terms and conditions on which they are of opinion that the inclosure should be made, and especially the quantity and situation of the allotments (if any) which under the provisions of this Act should be appropriated for the purposes of exercise and recreation and for the labouring poor." The section then goes on to provide for allotment to the lord, in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any part of the mines, minerals, stone, and other substrata

Lord's interest  
in the soil.

of such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants. This is beyond all doubt a most liberal

Right of pasturage.

and enlightened section. Allotments for the purposes of recreation and exercise and for the benefit

of the labouring poor are made superior rather than subordinate to the main objects — the improvement of common

Result.

land and the productive employment of labour; and

it is very clear that no inclosure could equitably be made under this section without allowing a very large margin to be devoted to the purposes of the allotments mentioned and to the common of pasture of the lord or his tenants, when that right was included. Waste parcels of a manor cannot be inclosed by the commissioners without the lord's consent. This is equivalent to

The Common Law vindicated.

enacting that the commissioners shall not override the lord by appointing commissioners to inclose the waste, and, like the statute of Merton, it merely

declares to what the lord shall be entitled.

The following section (sec. 30) gives us further proof of the paramount consideration which the Legislature has been inclined to give to the claims of populous places

Claims of populous places.

to have allotted to them spaces for exercise and

recreation, for it enacts that "in the provisional order of the commissioners concerning the inclosure under the provisions of this Act of any waste land of any manor on which the tenants of such manor have rights of common, or of any other land subject to rights of common which may be exercised at all times of the year for cattle *levant* and *couchant*, or to any rights of common which may be exercised at all times of the year and which shall not be limited by number or stints, it shall be lawful for the commissioners to require and in their provisional order to specify, as one of the terms and conditions of such inclosure, the appropriation of an allotment for the purposes of exercise and recreation for the inhabitants of the neighbourhood"—to 10,000, ten acres; 5000 and less than 10,000, eight acres; 2000 or less than 5000, five acres; and in every case except as aforesaid, four acres. Again we meet with a section (74) providing for allotments for the exercises of individuals subject to the obligation of keeping the fences in repair and permitting a user by the

inhabitants of the neighbourhood. Sections 76 and 77 provide an allotment for the lord in respect of his interest, and the residue is awarded to the commoners; but the Third Amendment Act allows a compensation to be made to the commoners in money where the claim of each does not exceed five pounds. By section 96, seigniories, royalties, franchises and manorial jurisdictions are saved out of the operation of the Act unless by consent. And lastly, let it be observed that section 107 provides that the allotments shall be taken in full bar, satisfaction, and compensation for lands and rights of common. We thus complete our digest of so much of the Statute Law as we deem it necessary to introduce here.

Jurisdictions  
saved.

Allotments to  
be bar, satisfac-  
tion, and com-  
pensation.

Few legal opinions have been expressed concerning the construction of the Inclosure Acts. One case, however, which came before the Master of the Rolls and the Lords Justices<sup>a</sup> furnishes us with some useful observations of an authoritative character. With reference to the power given to the commissioners by 8 and 9 Vic. c. 118, and 9 and 10 Vic. c. 70, to exchange lands of different tenures, Lord Romilly says that one clear intention of the Legislature was that the country should not be dotted about with parcels of land of gavelkind or Borough English tenure. Lord Justice Turner observes upon this and upon the power of the commissioners generally. "I am satisfied," he says, "the object was to facilitate such exchanges as might be beneficial; but all the provisions of the Acts with reference to inclosures evince clearly that the commissioners were regarded by the Legislature as persons in whom a wide discretion was intended to be reposed. . . . The interests of the owners, by the terms of the 147th section, are put under the protection of the commissioners, who are constituted judges whether the proposed exchange is beneficial to the owners."

Deferring for a moment longer our reference to the statute of Merton, we draw from the foregoing the following conclusions:—I. That the principle by which the Legislature has been mainly guided is that of balancing class-interests, and thereby obtaining land for cultivation which has hitherto been waste. The spirit of accurate compensation

Conclusions.

<sup>a</sup> *Minet v. Leman*, 24 L. J. Ch. 545.

pervades all the Inclosure Acts—the right of no class is allowed to predominate, or to claim an unfair share in the allotment.

II. That the Inclosure Acts recognised the ancient rights of a body older than the law of landlord and tenant, that is, the people, allotments for exercise and recreation being provided for in every case where the waste adjoins large towns; and that Parliament desires to restrain the lord from reaping private advantage from public measures. This is clear from the Acts which we have cited, by which it is provided that where an inclosure is allowed to be made for the recreation of an individual, it must be upon condition that the public are admitted.

We have hitherto purposely refrained from noticing the last Act of the past Session—29 and 30 Vic. c. 122.

29 & 30 Vic.  
c. 122.

That is an Act which must be considered as belonging to the legislation which we shall presently advocate, rather than to that which is discussed in this section. It is not an Inclosure Act, its object being to “make provision for the improvement, protection, and management of commons near the Metropolis.” The idea which it developes is somewhat peculiar. It ousts the jurisdiction of the commissioners until a memorial containing a scheme has been presented by the lord or commoners. Two months are given for the reception of suggestions and objections, after which period an assistant-commissioner may be appointed to inquire into the scheme. The final settlement lies with the commissioners. The Act contains the main features of the old Inclosure Acts, namely, the provisions whereby “no estate, interest, or right of a profitable or beneficial nature in, over, or affecting a common, shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme without compensation.” The section which provides us with the “interpretation of terms” proves to us, however, that the Act is not calculated to meet the state of circumstances which mainly it is our present object to consider, to wit, the case of a common upon which commoners’ rights have to all appearances and to all living knowledge utterly lapsed, inasmuch as we are told “the term ‘common’ means land subject at the passing of this Act to any right of common.” Therefore whilst the material contained in this Essay may be of great utility in assisting those engaged in



the administration of this new law respecting metropolitan commons, it has been compiled with a view to an object which lies beyond—the preservation of commons where there are no common-rights. Nevertheless, the Act may be made the basis for a more extended statute concerning which suggestions will be made hereafter.

A very few words are necessary as to the present legal effect of the statute of Merton, and the distinction between agricultural wastes and wastes near cities and large towns. It has been observed that the statute of Merton applies to no right of common but common of pasture appendant or appurtenant to a tenement.<sup>o</sup> There is, however, a dictum of Buller, J.,<sup>p</sup> to the effect that at Common Law the lord might have approved as much in cases of common by grant as of common appendant; but this has not been supported by any decision. In one case, indeed, two judges declared their opinion that the lord could inclose at Common Law.<sup>q</sup> It is observable that those opinions were extra-judicial. Lord Coke says distinctly that the lord could not approve by the Common Law because the common of pasture issued out of every part of the waste.<sup>r</sup> Windham, J., in a case cited below, also observes that before the statute of Merton the lord could not approve.<sup>s</sup> Therefore when Lord Coke says that the statute was passed in affirmance of the Common Law, he must intend that it was passed to render certain that which, to say the least, was precarious at the Common Law. That it did not *declare* what was the Common Law is quite clear from the statute itself, as Mr. Justice Best pointed out in his argument in a case previously cited,<sup>t</sup> for the words used are, “it is provided and *granted*”—not declared. Therefore we have simply to deal with a statute standing alone. In this instance it is agreeable to the Common Law principle. Had it been otherwise, and had the statute differed from the Common Law, we have recourse to the known rule of construction, that where the Common and the Statute Law differ, the Common Law gives

Present legal  
effect of the  
Statute of Mer-  
ton.

<sup>o</sup> 2 Inst. 475.

<sup>p</sup> *Glover v. Lane*, 3 T. R. 445.

<sup>q</sup> *Duberly v. Page*, 2 T. R. 391.

<sup>r</sup> See *Shakespear v. Peppin*, 6 Term Rep. 741.

<sup>s</sup> *Goe v. Colther*, 1 Sid. 106.

<sup>t</sup> *Shakespear v. Peppin*, *supra*.

place to the Statute Law.<sup>a</sup> And supposing the statute of Merton to be opposed to the modern Inclosure Acts, there is the residue of the rule to assist us—an old statute gives place to a new. Assuming yet further that the lord could approve, in spite of recent Acts which say that no land shall be inclosed without the previous consent of Parliament, it is difficult to see what benefit would accrue to any one from its operation above that which arises from modern inclosure process. At a future page we shall cite an opinion which suggests a doubt whether a lord could approve an entire common in case of lapsed rights—whether he would not be compelled to leave sufficient common of pasture for such cattle as might be supposed to be *levant and couchant* upon the old inclosures. The framers of the statute of Merton obviously had the thought in their minds that an allotment would always be made in favour of a right once existing and attached to ancient inclosures, for, as Baron Rolfe remarked,<sup>\*</sup> the statute says nothing as to the nature and extent of the interest which the lord was to have in the soil. We consider, therefore, that (whilst the lord would be in no degree a gainer by approving in preference to inclosing) if Parliament declines to allow him to do the latter it is fully justified in forbidding him to do the former. Indeed it is hardly to be conceived that when the Inclosure Acts were passed, approvement under the statute of Merton was not contemplated and embraced within the prohibition to “inclose” without consent. Consequently, if it cannot be said that the statute is expressly repealed, it must be allowed that it is altogether superseded.

The Statute of Merton superseded.

The only distinction between wastes near cities and towns and wastes in agricultural districts, is that which recent statutes create, as pointed out in a previous part of this section. It is unnecessary to go over the ground again and to show the particular application of Acts to the various commons according to their distance from cities and towns. Obviously at Common Law all wastes are alike, and subject to similar rights and liabilities.

Metropolitan and rural wastes.

<sup>a</sup> *Truscott v. Merchant Taylors' Company*, 11 Ex. 855.

<sup>\*</sup> *Patrick v. Stubbs*, 11 M. and W. 830.

Although the heading of this section points to a consideration of the principles of future as well as of past legislation, we deem it advisable to defer our suggestions until we have discussed the lapse of commoners' rights and the rights to which the public is entitled upon manorial wastes. To this we devote the succeeding section.

## VII.—LAPSE OF COMMONERS' RIGHTS—PUBLIC RIGHTS.

The modes by which a right of common may be extinguished are the following :—First, by a release of it to the owner of the land ;<sup>7</sup> secondly, by unity of possession of the land ;<sup>8</sup> thirdly, by severance of the right of common—and a right once severed can never attach again ; fourthly, by enfranchisement of a copyhold to which a right of common is annexed ; and fifthly, by inclosure.<sup>9</sup> Where it can be fully established that any of these processes have been carried out legitimately and without any abuse of power conferred by Statute or Common Law, there can be no mystery about the disappearance of the rights of common. But it must frequently be difficult to establish the fact, and particularly so when manors are situated near cities and large towns. Consequently, we see commons upon which no rights of common are exercised, upon which the lord asserts no right of absolute ownership, but upon which the public have gained easements. It is indeed hard to believe in the utter lapse and total disappearance of common-rights <sup>Lease of rights.</sup> where the area of the waste is at all extensive, for if there are neither freeholders nor copyholders to assert their claims, prescription and user might generally be <sup>Prescription.</sup> supposed to have created new rights, and it may be well to consider therefore how and by whom such rights may be acquired.

Obviously, a distinction must be drawn in this respect between commons near cities and towns and commons in agricultural districts. In the latter the residents <sup>Stationary population.</sup> abide a long time, generation succeeding generation <sup>Shifting population.</sup> in the same locality, exercising the same occupations

<sup>7</sup> Bracton, 223 ; Brit. 144 ; 3 Leon. 202 ; 5 Rep. 101. <sup>8</sup> See Woolrych, last ed., p. 137.

<sup>9</sup> Tyrringham's Case, 4 Rep. 36 b ; Corbet's Case, 7 Rep. 5 a.

and the same rights over the same lands; whereas in the neighbourhood of cities and towns the population is shifting; as the boundary extends, property becomes more valuable, the owners are tempted to become vendors, and the chain by which a prescriptive right might have been gained is broken. Mere possession of a messuage and lands

Possession not  
sufficient.

is not sufficient to establish a right. The Court of

Queen's Bench have doubted—and a doubt by the court is in some cases equivalent to a decision—whether in trespass for chasing sheep it would be a good plea to allege that the defendant was possessed of a messuage and lands by reason whereof he was entitled to right of common. They could not, it was observed, find any case in which the principle was recognised that as against a wrongdoer it is sufficient to allege possession.<sup>b</sup> Neither can it be claimed by custom that every tenant, inhabitant, or occupier of any messuage within a borough has been used to have common. For it is settled that

*Profit à  
prendre.*

where an interest or *profit à prendre* is to be claimed out of another man's soil, it must be alleged by way

of prescription<sup>c</sup> and not by custom, unless in the case of a copyhold tenant against his lord.<sup>d</sup> And one chief objection against claiming such a custom is that it cannot be released, whereas if it be annexed to the fee, it may. A claim of common

Claim *quod in-*  
*habitant* bad.

pleaded by an inhabitant as an inhabitant merely is bad; it must be pleaded either in the name of a corporation for the benefit of the inhabitants, or in

a *que* estate. Now as there is no jurisdiction in a corporation beyond its own parish, and as many a parish near cities, and in which lie the wastes of a manor, has no corporation, it is clear that prescription by the inhabitants is very rare indeed, if it exist at all. We have hitherto based our remarks upon authoritative judicial decision, but we come now to the functions of the jury and to the rules of evidence. A customary or prescriptive right is generally proved by usage, and instances of such an usage, although comparatively modern, are, if supported by other evidence, conclusive.<sup>e</sup> Where this evidence cannot be

<sup>b</sup> *Richard v. Fry*, 7 A. and E. 705.

<sup>c</sup> *Mellor v. Spakman*, 1 Wms. Saund. 341 (n. 3.).

<sup>d</sup> *Rex v. Churchill*, 2 B. and C. 755.

<sup>e</sup> *Rex v. Heyte*, 6 T. R. 430; Roscoc, 11th ed. 488.

procured, a right of common appurtenant may be proved by reputation. The statements of persons deceased might frequently tend to establish a right, but when <sup>Reputation.</sup> unaccompanied by an act such statement will not be received.<sup>f</sup>

Viewing the matter broadly, we are inclined to attribute the lapse of commoners' rights, near towns more particularly, to severance and enfranchisement and the <sup>Broad view.</sup> absence of any persons who might prescribe. And if we regard the lapse in the generality of cases as complete and beyond the power of revival—temporary non-user not operating as a bar in all cases<sup>g</sup>—we see the rights over wastes of manors resolved into these, *viz.* the right of the lord in the soil and the right of the public whatever it may be determined to be. Where commoners' rights are gone altogether, the lord, *prima facie*, may approve the whole. This being so, it is immensely important to consider what rights the public can set up, and to what extent public claims of this nature ought to be supported and encouraged by Parliament.

There is no doubt that various rights of common are in many places illegally exercised by the *inhabitants* generally;<sup>h</sup> for it is a settled rule of law (as already <sup>Prescription versus custom.</sup> stated) that although inhabitants may prescribe for an easement, as a right of way to a church or market, yet that *commonable* rights cannot be claimed in respect of inhabitancy only. Lord Coke marks the distinction.<sup>i</sup> He says, "Another difference was taken and agreed between a prescription, which always is alleged in the person, and a custom, which ought always to be alleged in the land; for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, *et ex certâ causâ rationabili* (as Littleton saith) *usitata*, but need not be intended to have a lawful beginning, as custom to have land devisable, or of the nature of gavelkind, or Borough English, &c. These and the like customs are reasonable, but by common intendment they cannot have a lawful beginning by no grant, or act, or agreement, but only by Parliament."

<sup>f</sup> *Capendick v. Bridgewater*, 24 L. J. Q. B. 289.      <sup>g</sup> Woolrych, last ed., p. 137.

<sup>h</sup> 1 Scriven, 524.

<sup>i</sup> *Gateward's Case*, 6 Rep.

We must consider, then, how easements may be acquired.

Easements. The modes may be enumerated in the following  
 Gale on Easements. order:—(1) By implied grant; (2) By necessity;  
 (3) By prescription. The first and second heads may  
 be referred to the same source—a grant to be implied; and this  
 is a subject upon which no abstract principles can be laid down,  
 and our space will not allow us to give instances  
 Implied grants. of implied grants. Thus much, however, may be  
 stated with reference to the public necessity, *viz.* that where  
 inhabitants of a parish have no other approach to a certain  
 quarter than over manorial wastes a grant of a right of way  
 will be implied.

To rights of way we must confine ourselves, as it must be  
 now quite clear that “the public”—meaning thereby not only  
 the inhabitants of a particular parish, but of an adjoining city  
 or town if there be one—can have no right of *profit à prendre*  
 in any waste. Now highway is the *genus* of all  
 Highways. public ways, as well cart-horse as foot ways. *It is a*  
*passage open to all the Queen's subjects.* It may be a footway,  
 appropriated to the sole use of pedestrians; a *pack and prime way*,  
 which is both a horse and foot way; or a cart way, which com-  
 prehends the other two, and also a cart or carriage way.<sup>1</sup> Yet it  
 is still a highway. And not only may the soil over which the  
 highway passes be vested in an individual, but it may be subject  
 to a private right of way co-existent with the public one.

Dedication. Dedication is the actual or presumed process by which  
 the public obtains its right; and when can dedica-  
 tion be presumed, is the vital question. Coleridge, J., in the  
 case cited in the note,<sup>1</sup> says, “Where there is satisfactory evi-  
 dence of user of the road by the public, it is not necessary to  
 inquire from whom the dedication proceeded, which is the natural  
 inference from the user. When such user is proved,  
 User. the onus lies on the person who seeks to deny the  
 inference resulting from it to show negatively that the state  
 of the title was such that no one could make a valid dedication.”

No particular time is necessary to establish a dedication. If  
 the act of dedication be unequivocal, it may take place imme-

<sup>1</sup> Co. Litt. 56 a.

<sup>1</sup> *Reg. v. Petrie*, 4 E. and B. 737.

diately. But eight and even six years have been held time enough wherein to presume a dedication from user. But everything depends upon the special circumstances of each case; and the duration of the public user, which limits the rights of the owner of the soil, is not so important in this respect as the nature of the acts done by the owner of the soil, and of the adverse acts acquiesced in by him, as well as the intention indicated by those acts. Intention, indeed, is not so important as some suppose. Uninterrupted user (says Steer<sup>m</sup>) by the public for a number of years is evidence from which a dedication may and ought to be presumed; and Lord C. J. Denman, in *Reg. v. East Mark*,<sup>n</sup> observed, "The law as lately laid down has led the courts into unimportant inquiries as to there being an intention to dedicate a road to the public. It seems to me that if the jury find that there has been a long user as a public road, I am not at liberty to inquire into the question whether there was such an intention or not." Again he says, "I think that the mere fact of enjoyment of a public road for a great length of time ought to be perfectly conclusive of such an intention." Also it is important to observe that it is fully decided that a highway need not be a thoroughfare.<sup>o</sup>

To illustrate our remarks let us take the common of Wimbledon, and assuming (for the sake of argument) that all commoners' rights thereupon have lapsed, <sup>Wimbledon.</sup> the right of the public has been growing from the date of the decease of the last commoner, or from the date of the extinguishment of the last right. Of course the contention on the other side would be that the public have used the common by permission of the lord, and that that permission is revocable. The cases<sup>p</sup> which show what is and what is not a revocable license or permission, are given in the note merely for information. To argue upon them generally would extend this Essay beyond its limits. We say that in the case of nearly all of the

<sup>m</sup> Steer's 'Parish Law,' 209.

<sup>n</sup> *Reg. v. East Mark*, 112 B. 877; *Reg. v. Petrie*, 4 E. and B. 737.

<sup>o</sup> *Trustees of Rugby Charity v. Merryweather*, 11 East, 376 n.; *Woodyer v. Hadden*, 5 Taunt. 125; *Wood v. Veal*, 5 B. and A. 454.

<sup>p</sup> *Rez v. Mellor*, 2 East, 189; *Wood v. Leadbitter*, 13 M. and W. 838; *Perry v. Fitzhove*, 82 B. 737; *Hearti v. Ischam*, 7 Ex. 77; *Roffey v. Henderson*, 172 B. 574; *Taplin v. Florence*, 10 C. B. 764. And as to evidence, *Morant v. Chamberlain*, 30 L. J. Ex. 299.

metropolitan commons the license to the public is beyond revocation, even assuming an express license for every species of user originally, which in all probability could be established in very few instances. The inclosing a piece of ground with railings all the year round for cricketing purposes, the inclosure of a large piece of common during the greater part of July; these acts, going on year after year, suggest a general dedication, but the general unlicensed and indiscriminate user of the public is

the stronger evidence. These remarks extend to

Hampstead Heath. Hampstead Heath, over which successive generations have exercised a right (which is immemorial)

Mitcham. of urging donkeys, of walking, picnicing, and holding meetings and festivals; and to Mitcham, where

vagrancy finds a resting-place, and gipsies pitch their migratory tents, and scorch the grass—equivalent to turbary—with their fires. Had the lord of the manor immediately applied to Parliament for an Inclosure Act when the last right of common disappeared, it might have been troublesome to resist the claim;

Legislation. for he might have urged, that whilst a single commoner remained he left the common open because

he wished to allow the tenant or prescriptive commoner to exercise his right in whatever part of the common he pleased. But now assuredly Parliament would be justified in replying that the lord had for years led the public to suppose that the waste was dedicated to them for the purpose of recreation, the advancement of science, and the social well-being of the people. The ways in which dedications can be disproved are not numerous. It may be shown that during the alleged user the land was in the possession of a tenant, that obstructions had been from time to time erected, that there had been an extinguishment by alteration, and that the way was granted for a particular purpose other than the one contended for. Counsel and the court would of course consider the peculiarities of each particular case in selecting and receiving such evidence.

Under these circumstances and viewing the question in this light—to our mind the equitable and proper light in which it should be viewed—we do not perceive that Parliament can have any difficulty in passing one or more Acts prohibiting the inclosure of wastes which

Acts prohibiting inclosure.



even by equivocal acts have been in any way dedicated to the public. Government interference with the management of private property, as stated by the Commissioners of Woods and Forests, is objectionable and seldom productive of benefit. But where private rights over land grow dim and shadowy, whilst public rights by user grow proportionately clear and prominent, the Legislature is justified in stepping in and saying, as equity would say, that by the neglect, the *laches*, or the indulgence of the proprietor, he has allowed a right to overshadow his own—his claim is stale, and cannot be allowed to prevail. The injury which would be sustained by private rights in such an event would be no greater than has been silently acquiesced in, nay encouraged, by the proprietor of those rights up to the present time.

Public v. private rights.

On the other hand, should Parliament feel a delicacy in taking advantage of the lord's *laches* or magnanimous indulgence, they might have recourse to the spirit of the Inclosure Acts, and whilst giving ample space to the public make a compensatory allotment to the lord. One general act, however, would not do alone. Regard should be had to the nature of each particular common, its position, the acts of the lord and of the public respectively with reference to it, the wants of the public, and the importance or otherwise of the lord's rights.

An alternative.

And there are good grounds for an intervention of Parliament in this respect, as judicial decisions are not in favour of giving to rights of entering land to enjoy rural sports the effect of an easement acquired under the Prescription Act. A recent case cited in the note<sup>a</sup> affords a good illustration of this. There a claim by custom was set up for all the freemen and citizens of a neighbouring city to run race-horses over certain land on Ascension Day in every year, and it was held that it was not a claim to an easement within the meaning of the Prescription Act. The accuracy of this ruling appears when we consider the origin of that Act.<sup>b</sup>

Judicial authority.

<sup>a</sup> *Mounsey v. Iamsey*, 34 L. J. Ex. 52.

<sup>b</sup> As where in trespass q. c. f. in B, the defendant justified under a grant of a right of way over B by a deed lost by time and accident, and on issue joined

on a traverse of the grant it appeared in evidence that the way had been used *adversely*, and not by leave and favour, for twenty years and more, over the close B: which adverse user for so long a time

For a long time previous to its passing, it was established that the enjoyment of an easement as of right for twenty years was practically conclusive of the existence of the right from the reign of Richard I. Various devices were resorted to, and prominently among them the supposition of a lost deed granting the right. The Prescription Act put all these on a certain footing, and Mr. Baron Martin thus construes that Act: "To bring," he says, "a right within the term 'easement' in the second section, it must be one analogous to that of a right of way which precedes it, and a right of watercourse which follows it; and must be a right of utility and benefit, and not one of mere recreation and amusement. . . . It never was in the contemplation of Lord Tenterden, who framed the Prescription Act, to include within it such customary rights as entering land to enjoy rural sports, as in *Mullechamp v. Johnson*,\* or to dance upon a green, as in *Abbott v. Weekly*;<sup>†</sup> by analogy to which we hold this alleged customary right to run horse-races a lawful one at Common Law. What we think he contemplated, were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure."

Seeing, therefore, that it would be difficult to induce the courts to depart from a strict construction of the intention of the framer of the Prescription Act with respect to easements, and that few of the amusements now exercised upon metropolitan and suburban commons could be supported as customary rights; and seeing also how short a period has sufficed to establish a dedication of a highway, would not Parliament be justified in passing an Act somewhat analogous to the Prescription Act? The Prescription Act having affirmed an acknowledged right, the new Act would effect the same purpose. Whilst, therefore, there would be separate Acts dealing with peculiar individual cases, there would be this general Act, somewhat similar to the General Inclosure Act of 1845, the chief provision of which

Prescription  
Act, sect. 2.

Strict construction.

Provision of  
proposed Act.

the learned judge at the trial thought sufficient to leave to the jury to presume a grant. And the Court of King's Bench, on a motion for a new trial, confirmed

his opinion.—*Campbell v. Wilson*, 3 East, 294.

\* 10 Willea, 205.

† 1 Lev. 176.

would be that all common land upon which the public have been allowed an uninterrupted user, whether for beneficial and useful purposes, or for purposes of recreation and amusement only, be henceforth and for ever the property of the public, subject to an allotment by commissioners to the lord in respect of whatever interest he may possess therein," such right to be estimated by the manner in which he has treated the land up to the time of the passing of the Act. The settlement of this estimate would be a question for a jury in an ordinary *nisi prius* trial, and commissioners bearing a strong resemblance to a jury in the matter of their functions, there could be no possible objection to putting the power in their hands. And for the guidance of such commissioners we may mention that where a claimant to a right of way uses the way for all purposes for which he has occasion, it is at all events evidence of a general right of way. And that which applies to an individual applies with greater force to the public. It must be observed also that to make a valid dedication to the public, the act must be done by the owner of an estate of inheritance in the land.

#### VIII. SUMMARY.

We arrive now at the conclusion of a labour which has led us into a far more pleasant field of inquiry than we anticipated at the outset. It was thought advisable to summarise ancient rights and jurisdictions not directly affecting waste lands at an earlier period (§ IV.) because, although incorporeal rights of tenants of a manor do actually spring out of their tenancy either in houses or land, they have become to be regarded as distinct and separate property, the subjects of distinct and separate grants, or of isolated and peculiar customs; and because legislation has divided its action, Acts having been passed for the purposes of dealing with estates, and other Acts having been passed regulating incorporeal rights and the management of the land over which they are exercised. In this summary, therefore, we put aside the consideration of the ordinary relations existing during all time between lords and their tenants with

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<sup>a</sup> *Doe v. Hellard*, 9 B. and C. 789.

respect to their estates generally, and we shall review simply the evidence which we have adduced and the suggestions which we have made with reference to that part of a manor which we have called common or waste land.

Now, in the first place, the important fact is to be kept well in sight that the ownership of the soil of the waste of a manor is in the lord, and where there is an overplus beyond the wants of the cattle that might be *levant* and *couchant* upon the old inclosures to which the common was attached, there can be no doubt that in the absence of express prescription to the contrary, that overplus belongs to the lord.\* By such express prescription the commoners might exclude him from touching the surface all the year round, might dig turves upon it and carry them away; might even dig pits, and, if they fill with water, fish in them—yet all the while the lord is sole owner of the soil and may open mines and work for minerals. Starting with this fundamental principle, we see that whatever rights the tenants of the owner obtained upon the wastes were granted by the lord, were allowed by him to grow until custom made them permanent, or until the statute made them prescriptive, or grew out of user uninterrupted, adversely to or with the license of the owner. It being matter of doubt whether *all* the free tenants of a manor have a Common Law right of pasture in the waste, we will take the safe side, and say that some tenants alone have it. The question is not one of vital importance. Whether rights be grounded upon Common Law, upon custom, upon prescription, or upon usage, they are equally strong, the species of evidence required in each case having an equal efficacy in a Court of Law. Whatever the nature of the right, it is certain that a freeholder has no more and no better defence than a copyholder to an action for surcharging the common. One tenant, indeed, might have a title to put on more beasts than another; but it is by no means clear that this title was always or generally on the side of the freeholders. So much concerning bare rights.

It will be remembered how vast an amount of open common land has been inclosed within the last century. It may there-

\* Cooke on Inclosures, p. 66.

fore be safely inferred that half a dozen centuries ago the amount of common land was much larger. In early times the surplus land was not required. The population was thin, and foreign markets uninviting, or, more likely, non-existent. This state of things undergoing a change, the wastes vexed the eye of the avaricious lord. He complained that "he could not make profit of the residue of his common" not required by the tenants, and the statute of Merton gave him leave to inclose against common of pasture appurtenant and appendant, leaving sufficient to the commoners and ingress and egress—thereby granting to the lord power to exercise a right which was not definitely and conclusively established by the Common Law, and which previous to the Act he could not exercise without the consent of the homage.

Passing over the Acts of the Stuarts and other monarchs with reference to the common-rights in forests, which were somewhat peculiar in their nature, we come at once to the Inclosure Acts. According to the opinion which we have previously expressed, the curb was put upon the statute of Merton by the Act of 1845 (section 12), which contains a general provision that the inclosure of wastes of manors and lands subject to indefinite common-rights at all times is prohibited, unless the sanction of Parliament be previously obtained. This, we have remarked, was confirmed and extended by the fifth Amendment Act, which says that "no land" shall be inclosed without the consent of Parliament in each particular case. Considering the arguments which we have adduced in connection with the statute of Merton, it is difficult to see how it can be regarded, for all practical purposes, otherwise than as a dead letter.

The greatest simplicity characterises the principles of the modern enactments. Those passed in the reigns of the second and third Georges looked mainly to bringing into cultivation land devoted to no useful purpose, and the compensation of persons possessing rights upon it. It appears, however, that these rights were valued very highly, and great difficulty was experienced in obtaining the necessary assents of the owners and occupiers of tenements. The Act passed in the reign of Geo. III. refers to the promotion of husbandry and good drainage. In all the Acts of these reigns the rights of commoners

are most tenderly regarded and most assiduously watched—none are allowed to be extinguished without the fullest compensation, or without an agreement to which the commoner himself is a party. There is, indeed, an express provision concerning the demise or leasing of a portion—one-twelfth part—of the waste by the lord. He shall not do it without the consent of three-fourths of the persons having right of common assembled, and even then the rent reserved is to be devoted to the improvement of the residue of the waste. The Act of William IV. attacked the confusion arising from an intermixture of rights, and made provision for sifting and arranging them. It also contains provisions for the preservation of commons within certain distances of London and the large cities and towns of the kingdom. The principle of the Act of 1845 is the most important for our present purposes, inasmuch as it makes provision for the exercise and recreation of the people, and especially refers to the benefits intended to be conferred upon the labouring poor, the commissioners being empowered to set apart allotments for those purposes. The quantity of these allotments and their position lie within the judgment and discretion of the commissioners.

We consider it unnecessary, however, to go entirely through our section on the principles of past legislation. We recognise the obvious motives which urged forward that legislation. When Parliament first turned its attention to inclosure, population was not what it now is, and the habits of that population were not what they now are. The great object was the cultivation of land theretofore unfit for tillage. A secondary object was the productive employment of labour. Then social science, and therewith sanitary reform, took rapid strides, and called loudly for allotments for the benefit of the health of all classes of the people, and especially the labouring poor. Contemporaneously the games which are most appropriately played on large open spaces became highly popular, and recreation grounds in the vicinage of cities and towns actual necessities. Parliament legislated to meet the want.

We come now to the last and most important division of our subject. Can the public justly claim from Parliament an Act which shall protect commons, and those around London most especially, from inclosure by the lord? To this question the

first and obvious reply is that the public is at present in as safe a position as it can be with reference to these commons, inasmuch as *no land* can be inclosed without the consent of Parliament. The public, however, ask something more than this. They claim to be exempted from the chances connected with shifting opinion in Parliament, and we have asserted and done our best to prove that the claim is a fair and a just one, upon the principle of implied dedication. We admit that we have been unable to cite a judicial decision settling the point in our favour. There are, however, plenty of cases which decide that a short uninterrupted user of a road constitutes a highway dedicated to the public. We have only to extend this principle. Carriages, horses, and pedestrians have been accustomed for many years to traverse nearly every portion of every existing common, and surely a right of highway may be implied over the whole area of each common. The owner or lord has perchance not raised any obstruction whatever, nor objected to the manner in which the land has been used by the public. In an ordinary case of a highway this would establish a dedication.

Should Parliament feel reluctant to take this view of the question, out of regard for private rights, with all deference we would ask the Legislature to consider what those rights are. Mr. Wingrove Cooke seems to have thought that so long as old inclosures continued to attach to commons sufficient open common must be left by the lord to feed so many cattle as *might be levant and couchant* upon those inclosures.<sup>7</sup> But assuming that all the old inclosures have disappeared, the process has been slow and scarcely perceptible. It would be extremely difficult to decide in each particular case when the last commoner died, and when the last right was extinguished. But where the land for years has been subject to a public user inconsistent with the existence of any common-right, it is at least to be assumed that the lord recognises the lapse of the commoners' rights, and cares little for the extended rights which he acquires thereby. We illustrate our meaning by again referring to Wimbledon. The user by the Cricket Club of the ground at the most fertile end of the common, is wholly inconsistent with a right of common, because

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<sup>7</sup> See *Carr v. Lamber*, L. R. 1. Ex. 168, which Case however does not preclude further argument.

a considerable area is railed in during the greater part of the year. In the month of July again, nearly the entire common, with the exception of the cricket-ground, is used for the rifle meeting in a manner wholly inconsistent with the existence of any right of common. By allowing this—we care not whether the user be by express permission or otherwise—the lord of the manor has recognised the absence of commoners and the utter lapse of all common-rights. Whether he applied for an Inclosure Act, or whether he did not, signifies nothing. The public is not to be supposed to know that such an application has been made. If the lord claimed the soil free from all common-rights, he should have exercised plain palpable acts of ownership which would clearly have negated the presumption of dedication in the minds of the public. This at least he could have done apart from the question of inclosure. This he can now do, taking up the posts of the cricket-club, and breaking down the boardings and levelling the butts of the Rifle Companies—unless Parliament decides in favour of an implied dedication. Inclose he cannot without the consent of Parliament, but he may limit the public user of the common by putting up obstructions, if Parliament does not forbid it.

We contend, therefore, that no private rights would be sacrificed by the dedication of existing commons, absolutely and forever, by parliamentary enactment to the public uses to which they have been so long and entirely given up. This appears on the lord's own showing. When the public began to exercise a user inconsistent with the existence of common-rights, he knew that then was his time to assert entire dominion over the land, and to apply to Parliament for an Act confirming the right granted to him by the statute of Merton—allowing him to approve, that is, leaving sufficient for the commoners, and, there being no commoners and no ancient inclosures upon which cattle *might be levant and couchant*, to inclose the whole.

The opportunity is now past. The lord applies to Parliament too late: dedication is to be inferred; and we confidently look to the Legislature to ratify this equitable view of a question whose importance extends far beyond the limits of the present generation.



IV.  
AN ESSAY  
ON THE  
PRESERVATION OF COMMONS;  
DEALING WITH THE  
LEGAL AND HISTORICAL ASPECTS  
OF THE QUESTION.

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## ESSAY IV.

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A SINGULAR uniformity may be observed in the institutions established among those rude warriors that, either from the forests of Eastern Germany or the icy regions of the North, spread themselves during the early centuries of the Christian era over the countries of Western Europe. The institution known as the feudal system became the established form of government in each country, and notwithstanding a few minor differences of detail, was, in its main principles, ever the same among all the various tribes. This uniformity must be ascribed mainly to the fact that the barbarians brought with them from their native countries habits of life and thought, which, from their extreme rudeness, could hardly have admitted of much variation, and that, on establishing themselves in their conquests, they were all placed in similar positions and had the same moulding influences brought to bear upon them. The maxim that what had been gained by the sword must by the sword be maintained would operate upon them all. The necessity of drawing tight the bands which bound the victorious chieftain and his followers together, became in every case apparent. Each people found itself surrounded by a large hostile population, and each had to fear and provide against the inroad of some other horde of barbarians. To accomplish this purpose a duty was imposed upon all those tribes or families to whom land had been assigned, to appear in arms in defence of their own and the common territory ; and as land had been originally distributed according to the power or the number of each family or tribe, so the extent of the land allotted became the measure of the number of men to be furnished. A relation sprang up between the tribe and the chieftain, which had its origin in the necessities of their situation ; surrounded as they were by enemies

on every side, and persuaded of the necessity of having some judge and arbitrator for the settlement of their own differences. To maintain themselves in the territory they had gained, against both internal and external enemies, to provide some security for order and tranquillity amongst the members of their own people, and to bring the conquered territory into cultivation, were with each nation originally the prime ends of government. To attain these ends the feudal system was well adapted. The feudal noble, living in a castle which, in those times, when gunpowder was yet unknown, was almost impregnable, and surrounded by followers whose armour made them almost invulnerable, who were devoted to their lord and bound to him by ties more indissoluble than laws can possibly create, was easily enabled to overawe any discontent, that might arise amongst the unarmed and defenceless conquered people, and to appear at any moment in the field at the head of a small army, to assist in the defence of the common territory against invasion. The oath of fealty, and the obligation which he thus incurred to obey every mandate of his lord, was the only check which the rude barbarian would bear upon the natural liberty, which he had inherited from the stern warriors, who owned no master in the fastnesses of their native country. A particular tract of land was entrusted to the feudal chief. This was the province of his rude government, in which he had to preserve peace and order, and maintain roads and bridges. To its produce he and his followers had to look for the means of their subsistence. Just as, in those early times, those nations which had made some little progress in civilization, but were surrounded by savage and warlike tribes, established on the borders of their country what were termed "marches," and set over them governors who were termed "marquises," that they might serve at once as a bulwark against their enemies, and might by perpetual encroachment extend the borders of their country, and gain for themselves accessions of territory at the expense of their barbarous enemy; so the feudal chief was placed in his particular district as the outpost of civilization against the wildness and ruggedness of nature. All the land within certain limits that he and his followers chose by their labour to reclaim from its natural condition and to bring into cultivation, represented so much imme-

diate gain to himself, and ultimately so much benefit to his country.

Whether this system can be said to have existed among the Anglo-Saxons, is a question upon which the greatest authorities differ. The circumstances of <sup>Establishment of feudal system in England at the Conquest.</sup> the nation would seem to indicate, that the feudal form of government was one well suited to its condition. Many customs and institutions are found to have existed amongst them, and many anecdotes are related of their actions which would seem to justify the assertion, that they sprang from feudal sentiments and ideas. But the discussion of this question is here needless; certain it is that manors (the origin of which is the immediate object of this inquiry) were a Norman institution. By the Normans the feudal system in all its strictness was introduced into our country. From their position in France it was natural that the system should be carried by them to a high point of perfection; beset as they were by enemies, and being thus bound to be ever on the alert against invasions, and against any attempt on the part of the conquered people to expel them from the territory they had acquired. Necessarily then William, when, at the head of his feudal followers, in all of whom the feudal spirit was deeply implanted, he conquered England, and was compelled to hold it in subjection against a large hostile population, introduced a feudal form of government. The feudal system became then more rapidly established in our island than in any continental country, and the whole of English soil was distributed in accordance with feudal principles. As may be expected, the results have been, that feudalism has left our law, so far as it relates to land, imbued more deeply than the law of any other nation with its own peculiar spirit.

Upon feudal principles, two duties may be said to have devolved on William upon effecting his conquest; the one, to provide suitably for the dignity of the <sup>Institution of Manors.</sup> crown, in order that he might not only be the nominal feudal superior, but might exercise a direct influence throughout his kingdom; the other to reward with donations of parts of the conquered territory, his nobles and their feudal followers, who had accompanied him on his expedition, in accordance with their duty, as their feudal lord. He accordingly

retained in his own hands the lands which had belonged to Harold, Godwin, Edward, Alfgar, Edwin, Morcar, and generally those lands that had belonged to the Crown, or to those powerful nobles who possessed almost regal jurisdictions; while the lands of the Saxon nobles were doled out among his officers.<sup>a</sup> It is on this occasion that we first hear of lordships or manors. The king retained in his own hands no less than 1432 manors in different parts of the kingdom. Odo, bishop of Baieux, the king's uterine brother, was rewarded with 200 manors in Kent and 250 in other counties. Robert, Count of Moretaine, another brother, obtained for his share 973 manors; and other of his chief followers were rewarded with almost equal generosity. These manors, though in substance perhaps as ancient as the Saxon constitution, are considered by our best writers on English antiquities as of Norman introduction.<sup>b</sup> "A manor commenced," says Lord Coke, "when the king granted lands with jurisdiction to another, who then granted parcels of them to others, to hold of him by certain services."<sup>c</sup> The lords of manors, who were the grantees of the king, were styled his tenants *in capite*, and in the first ages after the Conquest were the nobles of the realm, and as such were expected to attend the king's court at the three great festivals. Towards the end of the 12th century, however, the poorer among them seem to have lost their privileges as such, and the distinction between the greater and the lesser barons arose. Manors differed widely from each other in size, nor is it easy to give an idea of their average extent.

The reader is at first inclined, on hearing of the enormous number of manors held by single individuals, to form an exaggerated estimate of their power and their wealth. But these nobles had been followed into the country by a number of retainers, who bore to them the same relation that they themselves bore to the king, and who therefore imposed upon them a similar obligation of providing for them. The number which the immediate grantees of the king were able to retain in their own hands became thus small in comparison with the number which they had to grant

Manors distributed by grantees of the king amongst their followers.

<sup>a</sup> Ellis's 'Introduction to Domesday,' vol. i. p. 228.

<sup>b</sup> Ellis, vol. i. p. 224.

<sup>c</sup> Co. Litt. 58.

away to their needy followers. These manors they granted away to be held of themselves on military tenure, and they were thus able every year to call out a body of men, who were bound to follow them into the field and serve them for forty days. In the case of every grant of land—whether it were made by the superior lord, the king, to a tenant in chief, or by this tenant as mesne lord to a sub-tenant—certain rights and duties arose between grantor and grantee. First and foremost among these were the duties of fealty and homage—a ceremony, by which the grantee acknowledged his benefactor as his feudal lord and himself as his vassal. The vassal was bound to perform the duties that belonged to his tenure. If he held by military service, he had to follow his lord to the wars; he had also to assist his lord by aids, when called upon to do so. If he died without heirs, his land escheated to his lord; if he left a minor son, the lord was his legal guardian till he came of age, and, as such, had the entire management of his estate; if the vassal left a son of full age, this son had to pay a relief before he was allowed to succeed to the land that had been granted to his father. If the vassal died, leaving only a daughter to inherit his land, the lord had the right of disposing of both her and her estate to whom he pleased. On the other hand, the lord owed to his vassal his protection and countenance. The feudal tie thus established was regarded as of a most sacred and inviolable character, as creating a relation between the parties as close as, or closer than, that which binds father and son.<sup>d</sup> As the king's tenants were bound to attend the king's court, which was the great council of the realm, to deliberate and advise their lord upon matters in which his prosperity and that of the realm were concerned, so the sub-tenants of these barons had to attend their courts and deliberate for the welfare of their lords. A

<sup>d</sup> As an instance of the regard paid to this feudal tie, we may point to the earnestness with which the brothers of Harold besought him not to appear in person at the battle of Hastings, as they thought the wrath of heaven must necessarily be visited upon him, if he fought in person against William, to whom he had taken the oath of fealty. We may also point to the story of the reconcilia-

tion of Henry II. with his rebellious son Henry. The latter, though received by his father with open arms, and though assured of the paternal forgiveness and affection, besought the king to receive his homage, thus choosing to repose on the artificial tie which bound the lord to his vassal, rather than trust to the natural affection of a parent for a child.

relation thus arose between the grantees of the king and their sub-grantees, similar to that which existed between themselves and the king. The spirit of the feudal compact was, however, in the case of mesne lords and their tenants, considerably impaired by the new regulation which William I. introduced into the feudal system. That artful monarch was anxious not to sink into the position of a merely nominal feudal chief, as many of the continental kings had done. He accordingly obliged all the sub-tenants to do homage to himself and only allowed them to do homage to their immediate feudal superiors—the grantors of their estates—saving the rights of the king. By thus trenching on the intimate relation between vassal and lord, and by the wise precaution he took of not bestowing any large amount of territory in the same district upon the same individual, but of scattering the possessions of his great nobles over the face of the country, William guarded against the danger of local magnates becoming in their own domains independent of the Crown, and prevented the feudal system from gaining in England that thoroughly military character which it acquired on the continent.

Thus the manors, which had been bestowed by William upon his vassals, were by them redistributed on feudal tenure amongst their own followers. To such an extent was this done, that Odo, to whom each manor subdivided amongst the lord and his vassals. four hundred and fifty manors had been allotted, did not retain more than a dozen in his own possession. But not only were the parcels of manors thus distributed, the land of each manor was still further subdivided. Every individual to whom land had been allotted, had been followed into the country by a certain number of warriors who looked to him for their reward, and this he could give them only by granting to them a portion of the land that had been assigned to him as his share. He moreover required the services of another body of men to enable him to till his ground, and the most obvious way of rewarding these (in times when money was but little used) was by granting to them liberty to cultivate some part of the estate. One portion of the land of the manor was then bestowed upon the lord's military retainers, who held their land by a tenure as honourable as that by which the lord held—viz. by military service. Such an estate was called a *feodum*



*militare*, and if it was of the extent of twelve plough-lands, the tenant held the degree of knight, and was bound to follow his lord on military service for forty days in the year. The tenants next in degree were those who held in socage. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. Socage tenure was of two kinds—free and villein socage. In the former case, the tenant held by services not only certain (it may be remarked that certainty was a necessary quality of socage tenure) but honourable, as by fealty, homage, and a fixed rent; in the latter case by fealty and certain corporal service, as ploughing the lord's land for a certain number of days. Tenure in free socage—into which all sorts of tenures held of the king or otherwise save only tenures in frankalmoign, copyholds, and the honorary services of grand serjeanty, were turned by the statute 12 Car. II. c. 24—answers to the freehold tenure of the present day. Accordingly, upon the creation of manors, the lords took as much land as was for their own use into their demesnes, they distributed as much as was convenient among their tenants; what was left was called the lord's waste. This, according to the doctrine of the law, was neglected by the lord because he had before taken into his demesnes what he had need of.\* The *terre dominicales*, or demesne lands, were cultivated by the lord's villeins and by his tenants in villein socage. The latter class were already provided for by estates of their own, the former had small plots of ground assigned to them upon the demesne, from which they were to draw their means of subsistence. In these, however, they had no settled estate, and they could at any moment be dispossessed. In these plots of ground, however, the villeins by successive encroachments came at length to possess indefeasible estates, which are known at the present day by the name of copyhold.

We have thus given a sketch of the great feudal family that subsisted upon a manor, each member of which had certain rights and certain corresponding duties. Each manor was in itself a little kingdom; each lord within his limits a petty prince. It was on

Principles and terms upon which the division was made.

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\* *Potter v. North, Ventris, 395.*

this principle that almost all the land of the kingdom was distributed. The lands of the bishops and greater abbots, which had been held before the Conquest in frankalmoign, were by the authority of the whole Legislature in the reign of the Conqueror redistributed upon this principle, and declared to be baronies, and subjected to the same obligation of homage and military service as the civil tenures.<sup>f</sup> And those lands which immediately after the Conquest were suffered to remain in the hands of their Anglo-Saxon tenants, were, almost all of them, one by one resigned into the hands of some great lord in the neighbourhood, incorporated with his possessions, and granted back again to be held of him on feudal tenure; just as, on a larger scale, John resigned his crown to the Pope and received it back again as the vassal of the Holy See. The feud was conferred by words of gratuitous and pure donation—*dedi et concessi*—which formed the operative part of a feoffment, and the grant was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession, in the presence of the other vassals; which, in an age when writing was comparatively little used, presented the readiest means of confirming the grant. The interest thus conferred upon the feoffee was regarded as a stipendiary return for the services which he had performed and which he was expected for the future to render to his lord. It was consequently regarded, at first, as extending only for the life of the grantee; inasmuch as it was in consideration of his past and future services that it had been allotted to him. At his death, therefore, it reverted to the lord, and he could use his discretion about regranting it or incorporating it with his demesnes. But in a rude age prescriptive rights mature quickly; the son generally possessed the means of cultivating that his father had had, and as, in the first century after the Conquest, the feudal spirit remained strong in England, as the lords had retained in their own demesnes as much as their means enabled them to cultivate and as much as was sufficient for all their wants, and as their ideas of magnificence lay chiefly in the number and degree of the feudal tenants they could gather round them, the practice grew universal of allowing the

<sup>f</sup> Littleton's 'History of Henry II.,' vol. i. p. 43.

heir to succeed to his ancestor's estate upon payment of a tribute which was termed a relief; or, in more technical language, the heir was allowed to raise up again (*relevare*) the estate which had lapsed by the death of the ancestor. We may also mention another encroachment on the part of the tenants, which likewise in a short time came to be regarded as a right. When feuds were first granted by a lord, the grant rested on the condition that certain services should be performed by the tenant. These services he naturally could not perform by deputy; as, in the case of a feoffment made on condition of military service, it is reasonable to suppose that the lord was influenced in making the grant by the consideration of the personal excellence of the grantee. But it soon became the practice for the tenants to aliene their land. A tenant who possessed freehold lands of inheritance could convert his property into a manor, with manorial rights and immunities, by granting or selling a portion of it to two or three individuals to be held by them and their heirs for ever under fee or military service. This system gained the name of subinfeudation, and by this process the tenant of a freehold estate became, as between himself and his grantees, a lord; though, as between his lord and himself, he still remained a vassal. The superior lord, however, lost that security for the due performance of the feudal services which he had hitherto enjoyed from the possession by his vassal of the lands from which they were due. Nevertheless the vassals succeeded in making this encroachment on the power of their lords. The practice had, in the course of a century and a half, become so common that the charter of 9 Henry III. endeavoured to put a check to it, by enacting, that no man should be allowed to aliene so much of his lands as should leave him unable to perform the feudal services which he owed to his lord. The practice nevertheless still prevailed, and manors were multiplied beyond measure. At length, however, repeated complaints gave rise to the statute 18 Edward I. cap. 1, by which the creation of new manors was prohibited, and it was enacted that, in all sales or grants of land for the future the new feoffee should hold the land, not of the individual from whom he received or purchased it, but of the chief lord of the fee. Hence it is that at the present day no claim of manorial

rights is admitted unless they have existed as such since the year 1290.

It has before been mentioned, that after the lord had thus distributed as much of the land of his manor as was necessary between himself and his followers, in proportion to their respective necessities and means of cultivation, there was generally some portion remaining which was unappropriated. What was thus left was called the lord's waste. It remained, as the word denotes, uncultivated, and was covered, perhaps, with natural pasture, or with trees, underwood, or gorse; it might perhaps be covered with water and used as a fish-preserve, or it might be left in its wild state as affording turfs suitable for fuel. Before the statute 18 Ed. I. cap. 1 (commonly called the statute *Quia Emptores*) a right of common in this land was incident to a grant of arable land to certain tenants of the manor. By a right of common was meant a right to make a certain amount of use of the land in question. The use that would be made of it naturally varied according to the condition in which it lay. If it were grass-land, suitable for pasture, the right was known as right of common of pasture; a right of common of turbary was exercised over land supplying peat-sods; common of estovers, over those wastes that were covered with timber or underwood; common of piscary over the land covered with water. A grant of these rights of common was originally held to be included in a grant of arable land. It seems improbable that any limitation was originally imposed upon the exercise of this right; but when the land of the waste became of greater importance, the right of the tenant was limited according to the extent of his tenement. Thus, with regard to common of pasture, it was laid down that it was for as many cattle only as were, according to the old law French, *levant* and *couchant* on the land; the most common explanation of which term was, the cattle that could be maintained throughout the winter upon the land in respect of which the right of common exists. Nor was the tenant at liberty to use the right for all beasts, but only for those necessary to him in husbandry, as horses, oxen, cows, or sheep. This right he could not transfer to another, nor had he the power to license any one to put cattle on the waste; though

Rights of  
tenants up to  
A.D. 1290 over  
the waste land  
of the manor,  
that remained  
after this divi-  
sion.

he might feed cattle belonging to another upon it, if they were beasts which he himself had used for cultivating his land. In like manner, the right of common of turbary gave him the power to cut turfs sufficient for his household, but no more. By the right of common of piscary he was enabled to procure a reasonable amount of fish in proportion to the requirements of himself and household. Common of estovers gave him the right to take what were termed "botes," house-bote (under which was included fire-bote), cart-bote, plough-bote, hedge or hay bote. By this was meant timber growing on the waste sufficient to make any necessary repairs about the house, the implements of agriculture, the fences, &c. Thus, when this right, which was incidental to every grant of land, came to be regarded as a right to take a profit in the soil of another, the tenant was at liberty to take no more than was reasonably necessary to himself and the land in respect of which he had the privilege. This right became known as the right of common appendant, and may be distinguished from other rights of common by the fact that it is given by act of the law and not by act of the party.

All rights of common rest at the present day upon either grant, prescription, or custom. Prescription differs from custom in that it is personal, and is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; a custom, on the other hand, is local; it is not claimed as a right vesting in any particular person, but is laid within some manor or other place.<sup>5</sup> There are two incidents to both prescription and custom, *viz.* possession or usage, and time. Of these, possession must have three qualities, it must be long, continuous, and peaceable; in other words, the usage must not be exercised *vim, clam, or precario*. The length of time during which this usage must continue, in order to make it the basis of a prescriptive or customary right, is now regulated by the Prescription Act, 2 and 3 Wm. IV. c. 71. Before this Act, continuous user for "time out of mind," or "whereof the memory of man runneth not to the contrary," had to be shown; so that a prescriptive right to profits and easements could only

Rights of common—how claimable.

<sup>5</sup> Co. Litt. 113 b.

be established by what was deemed legal proof of an enjoyment of more than 600 years; the reign of Richard I. being considered the commencement of legal memory for all purposes, before the passing of the above statute.<sup>1</sup> The courts were driven to find a remedy for this absurd rule, by holding that proof of enjoyment as far back as living witnesses could speak, raised a presumption of enjoyment from the remote era. But even then frequent injustice was done, until this statute laid down the clear rule, that claims to rights of common and other *profits à prendre* should not be defeated after an enjoyment for thirty years, by showing only that such profit or benefit was first taken or enjoyed at any time prior to such period of thirty years. The statute nevertheless left such a claim liable to be defeated in any other way by which it might have been overthrown before the passing of the Act. It was also further enacted, that when such right, profit, or benefit has been taken and enjoyed for the full period of sixty years, the right thereto should be deemed absolute and indefeasible, unless it should appear that it had its origin in some consent or agreement expressly made or given for that purpose by deed or writing. The last clause will be readily understood, from the circumstance, that the essence of a Prescription Act is to presume an ancient grant, and to excuse its non-production, when it is over a certain number of years old. It follows then, naturally, that wherever a deed of grant is actually produced, the necessity for a Prescription Act to presume the existence of such a deed is at an end; and that the words of the grant, imposing any limitation or qualification on the enjoyment of the right in question, must be attended to. A custom also must, before the passing of this Act, have existed "from time whereof no memory is to the contrary" in order to be valid. But the spaces of time prescribed by the Act explain what is now the force of this expression; so that a custom need only be shown to have existed for thirty or sixty years in order to become the foundation of a valid claim.

"The English law," says Lord Coke, "is composed of three elements—the Common Law, the Statute Law, and local

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<sup>1</sup> 3 Chitty's Statutes, 695.

custom;" the two former being the broad, general rule of the country, the latter being local, and claiming to override the principles of the Common Law only in particular places. If therefore a custom be laid throughout the realm, it passes its local limits, and is no longer regarded as a custom, but is considered a principle of the Common Law; "for the Common Law is no other than a custom that extends over the whole land." As, then, it was a custom throughout the realm, that a right of common in the lord's waste was appendant to grants of lands to free tenants, before the passing of the statute *Quia Emptores* in the reign of Edward I., it follows that common appendant is of common right, and therefore a man need not prescribe for it. It is sufficient for him to allege that the land, in respect of which he claims common appendant, was granted to him out of the manor before the statute mentioned. Nor does it make any difference, in cases where this right is claimed, whether the land be pasture or arable, whether a house be built on it or not. For, although a right of common was originally, by the Common Law, appendant only to arable land, yet, if the land be now in any other condition, it will be presumed to have been originally arable.

A right of common on the waste passed as of common right to each tenant till A.D. 1290.

There are other rights of common analogous to the right of common appendant. The most important of these is that which is known as the right of common appurtenant. This resembles that of common appendant, in that it is attached to a particular piece of land. It differs from it in that it is not claimed as of common-right, but by prescription or custom—it is not claimed as an incident attached by law to the land in question, but as having been annexed to it by act of the party. Common appendant, being a right attached by the law to a grant of land made before A.D. 1290, cannot of course be created at the present day; common appurtenant however can, as it may be claimed either by prescription (in which case an ancient grant is presumed) or by the production of a grant. Common appendant may never be severed from the land to which it belongs; common appurtenant, however, is under no such restriction. Common appendant being of common-right, it follows that it is for the same

Right of common appurtenant.

animals all through the realm, *viz.* horses, oxen, sheep, and cows—these only being recognised as the animals necessary in husbandry; common appurtenant, however, is not thus restricted, but, according to the custom of the place, may be claimed for other animals, as swine or geese. The former must always be for beasts *levant* and *couchant* upon the land to which it is appendant; the latter may be more extended, indeed it may be claimed for any limited number of cattle.

Common in gross is not attached to any certain land, and must be claimed either by prescription or by deed. This, like the right of common last mentioned, may be created at the present day; either by a grant of a right of common over the grantor's own land, or by the grant of a right appurtenant to the grantor's land over the waste of another. Common appendant, however, as it can never be severed from the land to which it is attached, can never be converted into common in gross.<sup>k</sup> If the grantee of common in gross be not restricted to any particular number of cattle, he is said to have common in gross *sans nombre*; yet even in this case there must be some restraint or limitation.<sup>l</sup> The owner of common in gross is not necessarily restricted to any particular kind of animals in exercising his right of pasture.

Right of common *pur cause de voisinage* is when two or more towns have common in the fields within their towns, which are open to the fields of the neighbouring towns, and the cattle put to use their common there escape into the fields of the neighbouring towns, *et e contra*. And therefore this common is but an excuse for trespass.<sup>m</sup> If one vill or manor has a hundred acres of waste and the other only fifty, the latter can only use the common with cattle proportionate to the fifty acres. The right of common thus claimed is in the nature of common appendant, so that the owner can only use it for cattle *levant* and *couchant* upon the land in respect of which he claims it. Indeed the right springs entirely from a regard to mutual convenience, it having doubtless appeared to two neighbours better to pasture

Common in  
gross.

Common *pur  
cause de voisin-  
age*.

<sup>k</sup> 3 Comyn's Digest, 70.

<sup>l</sup> Ibid.

<sup>m</sup> Ibid. 71.



their cattle in common than to go to the expense of partitioning off their lands.

These rights of common come under the head of what in the Roman law were known as servitudes. In the case of common appendant or common appurtenant, the waste is the *terra serviens*; the land to which the right is attached, the *terra dominans*.

Rights of common claimable by custom only in case of copyholders.

A right of common is known in the English law as a *profit à prendre*. Both *profits à prendre* and what are known to our law as easements, are included in the Roman servitude, but they are quite distinct from each other. The right to an easement confers merely a privilege to be exercised over the neighbouring land without any participation in its profits—as a right of way, a right to the passage of light and air and water. A right to a *profit à prendre*, on the contrary, is the right to take a profit in the soil of another. This can be claimed as of common right, by grant or by prescription. It can also be claimed by custom, but that only in the case of copyholders.

The mention of copyholds, as they are much connected with our subject, and as rights of common in the lord's waste frequently belong to them, leads us on to an inquiry concerning their origin and nature. It has

Origin of copyhold tenure.

before been stated, that the lords cultivated their demesnes chiefly by the hands of their villeins, and that they allotted to these small parcels of the demesne lands, in order that they might cultivate them for their own benefit and depend on them for their subsistence. In these allotments they possessed for centuries no estate whatever recognisable by the law; nor could they be the holders of any chattel whatsoever as against their lords. Their position differed little from that of slaves, except that they were freemen as against all the world but their masters. Villeins were distinguished into *villeins regardant*, who had been attached from time immemorial to a certain place, and *villeins in gross*, where such territorial prescription had never existed or had been broken. The lords also made use of another class of persons in the cultivation of their demesnes. These were freemen, who were not bound by any tie to remain in the service of their lord; they also were rewarded for their labour by the lord with a plot of the demesne, which they were allowed

to cultivate for their own benefit, but they, like the villeins, were liable originally to be ousted from this ground at any moment by their lord. This precarious tenure was known as tenure in villenage. The word villenage had then a double sense, as it related to persons or lands. As all persons were either free or villeins, so all lands were held by free or villein tenure; and as a villein might be enfeoffed of lands of free tenure, his title to which (though they lay at the mercy of his lord) he could maintain against all the world except his lord, so a freeman might hold tenements in villenage. But neither did a man change his status according to the tenure by which he held his land, nor did the land change its tenure according to the status of the man by whom it was held. Thus tenure in villenage was always the same. The tenant, whether free or servile, had to perform certain base services upon the lord's demesne, and in return for this was suffered to cultivate the land allotted to him.

From so slight, and, in the eye of the law, so worthless a tenure, have the present copyholds arisen. But their growth was very gradual. For several centuries the tenants in villenage enjoyed only the precarious tenure we have described. It is difficult to imagine by what means they managed to raise their tenure to its present certainty; nor are we assisted in the inquiry by contemporary records. It seems however probable, that, in course of time, various alienations were made of the demesne lands to free tenants; so that the services of the tenants in villenage came by degrees, as the demesne became smaller, to be less required by the lord; the more especially as there were probably improvements made in agriculture, so that the same quantity of land would not need the same number of hands to till it that it had originally required. Thus the tenants in villenage, though their tenements were never separated from the lordship, finding their services less and less needed by their lords, became at leisure to hire themselves out to other persons, as against whom they were freemen. Thus, for the greater part of the year, they were hired labourers in husbandry independently of their lord; and, as it thus became rather the exception than the rule with them to work for their lords in accordance with the terms of

Copyhold tenure  
established.

their tenure, the practice crept up of making their services fixed and certain (which, considering the uniformity of agricultural operations, could easily be done), and, at length, of entering them in the manor-rolls. And thus, in the time of Edward I., we find the tenants in some manors bound only to stated services, as recorded in the lord's book. Their children would naturally assert a customary right to be entered in the court-roll, on the same terms as their predecessors, and at length prevailed to get copies of it for their security. Nevertheless the title of copyholders (as they, from this circumstance, began to be called, as holding by copy of court-roll) to their estates remained for some time very precarious; and in the reign of Edward IV. it was held that, if a lord ousted his copyholder, he had no other remedy than to sue him by petition. But it was laid down in this reign by Danby, Chief-Justice of the Common Pleas, that a copyholder, observing the customs of the manor, and performing his services, should, if turned out by his lord, have an action of trespass against him—a doctrine which has since that time been regularly upheld; for “albeit the copyholder is tenant *ad voluntatem domini*, yet it is *secundum consuetudinem manerii*.”<sup>a</sup>

A copyhold estate may now be described as the interest gained by a grant from the lord of a parcel of the demesnes of the manor, confirmed by an admittance of the tenant, entered on the court-roll of the lord; to be held at the will of the lord, according to the custom of the manor. In copyhold estates, the freehold remains in the lord, who also, at the present day, possesses various rights over them; though the rights that he used to have to the services of the tenants are now universally commuted to money payments. There are then two circumstances necessary to the existence of a copyhold estate: that the lands must be parcel of a manor, and that they must have been demised or demisable by copy of court-roll from time immemorial. It follows, then, that copyholds cannot be created at the present day, and that the tenant must attend at the manor-court, which is necessary to the existence of every manor, in order to be admitted to or to sur-

Definition of  
copyhold.

<sup>a</sup> See Hallam's 'Middle Ages,' vol. iii. pp. 173-176, and 1 Cruise, 254.

render his estate; so as to have a record made of it on the court-roll, and obtain a copy of it as evidence of his title.

When we consider the origin of copyhold estates, we do not recognise the necessity that a grant of common should be attached to the land as an inseparable incident, as we do in the case of a grant of arable land on the first distribution of manors. The holder of land by the tenure of villenage probably very rarely possessed beasts of the plough or other cattle; and if he did so, and were a villein, they lay at the mercy of his lord. A right of common appendant is therefore never attached to lands of copyhold tenure; but in most manors a special custom exists for the copyholders to have a right of common over the waste, appurtenant to their estates. This right of common comes at once to an end, if the land to which it is appurtenant be enfranchised, and so ceases to form part of the manor. As, on the one hand, *profits à prendre* can be claimed by custom only by copyholders; so, on the other hand, it is only by special custom that copyholders can make such a claim, their estates not being of sufficient value, in the eye of the law, to enable them to prescribe.

In times when the feudal feeling was strong, and when there was a close personal relation between the lord and his vassal; when the lord was to his tenant his leader in war, his judge and protector in peace, and when, moreover, the land of the kingdom bore so large a proportion to the number of inhabitants, and the means of cultivation were so rude that it was of itself of comparatively little value, it is probable that the lord and his tenants went on pretty smoothly together, and that their various interests over the waste land of the manor rarely came in conflict. When, however, population increased, so that the possession of land for cultivation became of greater importance; and when, owing chiefly to the spirit of extravagance engendered by the crusades, many lords of manors became impoverished, and were desirous of mending their broken fortunes by making as much as possible of their manorial rights, the power over the waste lands, over which the rights of common had been exercised, became of importance, and the interests of the lords and those of the tenants, who had rights of common,

Copyholders  
may have a  
right of common  
by special cus-  
tom.

Proprietas in  
the soil of the  
waste was vest-  
ed in the lord;  
the statute of  
Merton in  
affirmance of  
this principle.

and who were termed the commoners, came into collision. The lords came out of that conflict victorious, and have managed to retain in their own hands ever since great and undefined powers with regard to the waste, by means of a legal theory, which was propounded by the lawyers and upheld by a legislature composed of landowners; but which, looking at the circumstances of the original grant of manors, seems to have no good foundation in either justice or expediency. This theory was, that to the lord alone belonged the soil of the waste, and that the commoners had no property in it whatever. The study of Roman law, which had lately been carried on with great ardour in Europe, introduced into our law the distinction between the *dominium* and the *usus*, which has produced such extraordinary effects in the history of jurisprudence. The notion thus arose that though a partial *usus* was vested in the commoner, the *dominium* always remained in the lord. The presumption thus always was (although at the same time it was liable to be defeated) that the lord remained owner of the soil. As such, he must necessarily retain (for here again the Roman law came to his aid) certain rights over the waste. So, if a man claim by prescription any manner of common in another's land, to the exclusion of the owner of the land from pasture, estovers, or the like, this is a prescription or custom against the law, to deprive the owner of the soil.\* Even, therefore, if the lord had virtually long ago abandoned all right to make any use of the waste, the theory in question came to his aid and said his rights still continued. But the chief consequence of this theory is to be found in the statute known as the statute of Merton, which was passed in the twentieth year of Henry III. The preamble to that statute recites that "whereas many great men of England (which have enfeoffed knights and their freeholders of small tenements in their great manors) have complained that they cannot make their profits of the residue of their manors, as of wastes, woods, and pastures, whereas the same feoffees have sufficient pasture as much as belongeth to their tenements: it is provided and granted, that whenever such feoffees do bring an assize of novel disseisin for their common of pasture, and it

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\* Co. Litt. 122 a.

is acknowledged before the justicers, that they have as much pasture as sufficeth for their tenements, and that they have free egress and regress from their tenements unto the pasture, then let them be contented therewith." This statute, which is said by Lord Coke to be in affirmance of the Common Law, gave to the lord of the manor power to inclose and (as it is termed) approve as much of the waste as he chose, provided he left sufficient for the commoners. He became thus residuary owner of the waste. If the rights of any of the commoners lapsed, he alone reaped the benefit. He alone could give licenses to use the pasture of the waste; to him alone belonged any minerals that might be found there. He might exercise every conceivable act of absolute ownership, provided only that he left sufficient for the commoners. He could, upon this condition, breed conies, plant trees, cut timber, dig gravel or sand, and exercise the right of sporting.

If, however, the lord made too extensive a use of the privileges thus conceded to him, the commoners had a summary method of redress left to them, in breaking down the fences which the lord had erected (for he must naturally fence off all the land he has approved, and if he neglect to do so he has no redress against the commoners' cattle straying upon it), though at the same time they are forbidden to kill the conies with which the lord has stocked the waste, even if they destroy all the pasture to which they have a right. The reason of this is said to be that "the lord by his grant of common gave everything incident to the enjoyment of it (as ingress, regress, &c.), and thereby authorises the commoner to remove every obstruction to his cattle grazing the grass that grows upon such a spot of ground, because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate, or a wall, to keep the commoners' cattle out, is inconsistent with a grant that gives them a right to come in. But the lord remains owner of the soil and is not debarred from acts of ownership."<sup>p</sup> It is, however, difficult to see how keeping the commoners' cattle out is more inconsistent with a grant giving them a right to come in, than destroying the herbage of a

Remedy of commoner against the encroachments of the lord on the waste.

<sup>p</sup> Per Lord Mansfield, in *Cooper v. Marshall*, 1 Burrows, 266.

common is, with a grant of that herbage for the benefit of the commoners' cattle. Another reason given is, that the commoner has no right to meddle with the soil (which is the property of the lord); that a commoner, by destroying the hedges, does not meddle with the soil, but only with the erection. If, therefore, a commoner stop up rabbit-burrows, he trespasses on the property of the lord. The most satisfactory explanation, however, of the distinctions thus made seems to be found in the jealousy, with which the law guards over any kind of game or beasts of warren. Not only may the lord keep conies on the waste for his amusement, but he has the sole right of sporting over the waste, as a necessary incident to his ownership in the soil.

These extensive powers are vested in the person whom the law regards as the owner of the soil of lands over which common-rights are exercised. In the case of manorial wastes, the presumption of law is, as was above stated, that the lord of the manor is owner of the soil. This, however, is not everywhere the case. In the evidence of Mr. Blamire before the Select Committee of the House of Commons with reference to inclosures in 1844, it was stated that there were many cases in which the lord was no longer owner of the soil, and he even mentions one case (that of the manor of Dent) where the commoners not only possessed rights of common, but were the joint owners of the soil of the waste. In by far the larger proportion of cases, however, the lord is the owner of the soil of the waste. The legal theory that he is so gives him as ample an estate in the waste ground, over which common-rights are claimed by others, as in any of his freehold lands. The effects of this theory have hitherto been confined to enable the lords to make encroachments upon the rights of the commoners, and it has been only in comparatively recent times that its extreme incompatibility with the interest of the public at large has been perceived.

The law thus giving to the lords powers so extensive over the waste, it follows that the rights of the commoners must be proportionably small. The right which the law thus leaves to the commoner is (in the case of common of pasture) the bare right to take the grass with the mouths of his cattle; beyond this he has no

Ownership in the soil always presumed to be in the lord.

Rights of the commoners over the waste.

more property in or right over the waste than an indifferent person. Thus he is not recognised as having sufficient interest in the land, to enable him to bring an action of trespass for an injury done to it. Under such circumstances he is compelled to have recourse to an action on the case for damage done, as it were, consequently to his interest, and to plead his title to that interest in the name of another person.<sup>1</sup> He has no power to meddle with the soil. If it is honeycombed by conies he has no right to interfere; he may not even cut a trench or a ditch to let the water off the common without first obtaining the license of the lord.<sup>2</sup> He has not even a right to come upon the waste for any other purpose than to exercise his right of common; and it had been held that he cannot even justify, against an action of trespass, the coming to put his cattle on to the waste, unless he has actually put them in, or unless he came for the purpose of seeing if the pasture were in a fit state to receive his cattle.<sup>3</sup> He has, however, a means of defending the scanty portion of right, which the letter of the law allows him. He may bring an action against his lord if he surcharge the common, either by his own beasts or those which he has licensed. So he may distrain any cattle damage-feasant belonging to a person who has right of common,<sup>4</sup> or bring an action against another commoner for putting on more than his legitimate quantity.

It is a principle of law that a custom to take a profit *in alieno solo*, except in the case of copyholders, is bad.<sup>5</sup> It follows, therefore, that the law can never recognise or regard the claim which the poor people of villages conceive themselves to have by immemorial custom to turn out cattle on the waste. In numerous parts of the country it has ever been the practice, for time "whereof the memory of man runneth not to the contrary," for poor people to exercise this right of common. If they can make such a claim by prescription—that is, if they can say that they, their ancestors, and all those whose estate they hold, have always had such a right, the law will concede it to them. It is, however, obvious that poor

Rights of common over the waste, that were claimed only by custom, were not attended to by lords in exercising powers given them by the statute of Merton.

<sup>1</sup> Woolrych on Commons, 190.

<sup>2</sup> *Cooper v. Marshall*, 1 Burrows, 226.

<sup>3</sup> *Spilman v. Heritage*, 5 Vin. Abr. 35.

<sup>4</sup> 5 Vin. Abr. 38.

<sup>5</sup> Woolrych, 85.



people have rarely such an estate in the house or ground they occupy as would enable them to prescribe, and they are consequently reduced to claiming this right as a custom of the place, and in their character merely of inhabitants of the village. Claims of this sort are regarded by the law as bad for vagueness and generality, and being thus of no legal validity, most lords of manors, who were laymen, exercised the powers given them by the statute of Merton without paying any regard to them. It seems probable, however, that the ecclesiastics who were lords of manors (who, whatever their faults, must certainly receive the credit of having been indulgent landlords and bountiful in charities) made but small use of the powers given them by the statute, and were careful to allow these claims to common (though not recognised by the law) which were put forward by the poorer classes. Consequently, at the Reformation, when the ecclesiastical lands were given over to rapacious courtiers, who had no such scruples, but approved as much of the waste lands as they possibly could, great distress was occasioned among the people, who thus saw themselves suddenly despoiled, by what appeared to them no manner of right, of those privileges which they had from time immemorial enjoyed.\*

The extensive rights thus conferred upon lords of manors, and the scanty privileges left to the commoners and the public by the legal doctrine embodied in the statute of Merton, seem also, at the time of the passing of the statute, to have created great discontent, and to have been regarded as an usurpation. Lord Coke informs us that the statute was in affirmance of the Common Law; but if the right vested in the lords by the Common Law, it must certainly have been involved in much obscurity, and must have been generally disputed, or it would never have needed a statute to enforce it. At any rate, besides the fact that great popular discontent was caused in the reign of Edward VI. by the execution of the statute by the courtiers who had received the church-lands, we have the unquestionable authority of the statute-book for asserting that its execution was, from the very beginning, disputed. Numerous complaints were made by lords of manors that, when, in exercise of the right given them by the

*Statute of Merton originally very unpopular and regarded as an usurpation.*

\* Burnet's 'Hist. Reformation,' book i. part II.

statute, they approved any part of the waste, their inclosures were thrown down. Nor was it easy to discover the offenders. Accordingly a provision was introduced into the statute 13 Edw. I. c. 16 (commonly called the second of Westminster), enacting that when this was done and the offenders were not discovered, the adjoining township should be distrained to repair the damage done. It is certain, moreover, that improvements continued, during the Middle Ages, to excite great dissatisfaction, as a similar provision was introduced into the statute 3 and 4 Ed. VI. c. 3. Under these circumstances, we are justified in concluding, that the poorer people during the Middle Ages considered themselves very much aggrieved by the operation of the statute of Merton, and regarded every improvement under it as an unjust usurpation and an encroachment on the rights which they thought still remained vested in the people of England, and which had not been conferred upon the lords of manors, merely by virtue of a grant to them of manorial rights over the district in which the waste land lay.

When we consider the immense number of manors bestowed at the Conquest on individuals, and the very small proportion retained by the grantees in their own hands, when we consider the claims of their followers upon these grantees of the king (claims as strong as those of the grantees themselves upon the king) and the imperative necessity that there was, at a time when the amount of current money was small, and agriculture afforded almost the only means of subsistence, to provide for the cultivators of the ground by allotments of land, and, where this was not the case, by allowing them generally to draw their subsistence from that part of the manor, which, for the sake of convenience, was left uninclosed, it is impossible to resist the conclusion that the theory that made the grantee of the king, as lord of the manor, sole owner of the waste land of the manor, was in excess of the principle and the intention of the original grant. The grant was indeed made to the lord. The operative words of the feoffment were absolute and unconditional—*dedi et concessi*. But can it be supposed that the grantee himself was the only person intended to be benefited? If so, how came it that not one of the lords who

False view  
taken by the  
Legislature of  
the relative po-  
sitions of the  
lord and his  
tenant.

received so large a number of manors, retained them in his own hands? how came it that Odo, who received four hundred and fifty manors, retained but twelve of them? "A manor," says Lord Coke, "commenced when the king granted lands with jurisdiction to another, who before the statute *Quia Emptores* granted parcels of them to others to hold of him by certain services." Seeing, then, that the lord actually did not, and practically could not, retain the whole of the land in his hands, and that the idea of the grant never was that he should do so, but rather that it should be disposed of in the general manner in which it actually was disposed of, does it not seem reasonable to suppose that the intention of the grant was merely to confer upon him a certain share in the land, and that the gist of the grant of a manor was to confer upon him the jurisdiction and the right to the services? In times when the power of the king's courts was but little felt in remote districts, and when justices of the peace were unknown, it was necessary to create some kind of local jurisdiction. For this purpose, the land was divided into districts termed manors. Each manor was allotted to some individual, who was styled its lord. The land was allotted to him as the head of a clan, that he might distribute it amongst himself and his followers, that they might draw their means of subsistence from it. Within this region he was to maintain peace and order. In times, when every acre of ground was liable to contribute its quantum towards the general defence and towards the royal revenue, the lord, as head of his clan, was liable to the king for the feudal dues of his district, in the shape of soldiers and money. He was the responsible person to whom the king looked, and his clansmen—his tenants—contributed to these dues in proportion to the land they held. The head of the clan was at once the natural leader, the judge and protector, of his people. As lord of the manor, he was made the trustee of their property; and he was placed in this position in order that he might be the one responsible person, to whom the king might look. For the same purpose—*viz.* that there might be some one person responsible for the feudal incidents—the eldest son of a deceased tenant was allowed to succeed to his father, to the exclusion of all the other children. The original idea was evidently to make him a kind of trustee for his

younger brothers and sisters, that he might be the one responsible person, as far as the lord was concerned. In neither case was it originally intended that the lord of the manor in a grant, or the eldest son in a succession, should have the sole beneficial property in the estate. And it must be remembered that, in early times, the distinction between the *dominium* and the *usus* was not the familiar idea that it has become at the present day. Indeed, there was no occasion for such a refined idea. The people living on the manor were regarded as having an exclusive right to draw their subsistence from the land of the manor, and no further conception was made about the matter—the lord was regarded as the person responsible to the king for the feudal dues arising from it. Those parts of it that were necessary for the growth of corn for the district were allotted in severalty to various people, it being, even in those times, an ascertained fact that the safest way to insure the cultivation of the land was to follow the maxim “that he who sows shall also reap.” The remainder of the district was used in common as pasture by the people of the district, hence also they cut their wood for fuel, building, &c., and their turfs. It does not appear at all probable that each man was restricted originally in the use of this land, as he afterwards was; at a time when population was scanty, there was land enough for all, and the probability was not contemplated, that any one man would put an excessive number of cattle on to the waste. Indeed, no kind of law or regulation is ever made unless the necessity for it be apparent and unless it be to remedy something that is felt to be an evil. And, just in the same way, it is reasonable to suppose that the idea of the ownership of the soil (in the sense in which we now understand the word) vesting in the lord or in any one else was without existence in times when it could have been of no importance, and when, consequently, there was not the slightest necessity to form a conception upon the matter at all.

It appears improbable, that any law assigning to individuals a property in the gifts of nature ever arises, until such gifts are of an extent sufficiently small, in comparison with the population of the country, to become capable of being made the subjects of monopoly. As little would it be likely that the

Originally no necessity, as between the lord and his tenants, for a law of property in the waste.

idea of a law of property in land should have been conceived among the Scythians,

“ Immetata quibus jugera liberas  
Fruges et Cererem ferunt  
Nec cultura placet longior annua,”

as it would be that we, in the present day, should regard the air we breathe as a subject of property. Our ancestors, at the time of the Conquest, had naturally some idea of a law of property in land, as they had long passed the nomad stage in civilization. But how far did this idea extend? It extended so far as to recognise the district known as a manor, as the property of the clan to which it had been granted. To this society, as against all other societies, the land belonged; but, as between the members of this society, the necessity for a law of property in land had only arisen to the extent, that each man should

- possess in peace the portion allotted to him, and on the cultivation of which he had bestowed his labour. With regard to the waste, as that was superfluous land, a law of property, as there was no necessity for it, had not arisen. The lord, having the management to a certain degree of the common estate, distributed it amongst his followers in proportion to their means of cultivating it, and he retained as his demesne as much as he himself had the means of cultivating. The means of cultivating were measured by the number of men whose labour each could command. That this was the case is proved by the way in which each manor was distributed. The lord would surely have retained more land in his demesne, and would consequently have left less as waste, if he had had the means of cultivating it, and of disposing of its produce to advantage. But that this circumstance may not be taken as an argument to show, that there was a foundation in justice for the power afterwards conferred upon him by the statute of Merton, we may remark that, if his free followers had been more numerous, or had had larger means of cultivating, they also would have had larger grants, and the waste left would consequently have been smaller. And yet, though there is no reason to believe, but that both the necessities and the capabilities of the tenants had increased by the reign of Henry III. just as much as those of the lords, yet the statute of Merton gave to the latter power to do, for their

own sole benefit, that which, according to the idea of the original grant, they would have been bound to do for the good of their tenants as well as of themselves.

“The feudal system,” says Sir F. Palgrave, “never existed in the form assigned to it by jurists, and flourished in its supposed entirety only in the fancy of the learned.”<sup>7</sup> The theory of our law is certainly an afterthought, and, judging from the circumstances of the case, an improbability. There is no reason to be found, in early times, which would lead us to believe that there was any necessity for regarding what (borrowing the doctrine of the Roman law) became known as the *proprietas* or *dominium* of the whole manor as vesting in the lord by virtue of the grant; and there is, therefore, no reason to believe that the idea of its vesting in him was ever conceived. In course of time, however, it was found in several manors that the lords and their tenants possessed capabilities of cultivating larger portions than they had originally appropriated; and, as the age had made great progress in ideas of extravagance, both parties became desirous of appropriating some still larger portions of what had been granted as the common inheritance. The waste land of these manors had, in short, become so small in extent, in comparison with the population dwelling on the manor, that it had become capable of monopoly, and so came to be regarded as a subject of property. The question then arose, As whose property was it to be regarded?

At a time when the waste was amply large enough to allow all the tenants and others dwelling on the manor to take as much common as they wanted, without interfering with each other, there is no reason to suppose, that any regulations were made limiting each man's right. On the other hand, it was inevitable that, as soon as unlimited rights of common produced inconvenience, regulations should be made imposing some limitation. Each man was, consequently, restricted to taking common in the waste in proportion to his

Theory of the law on this subject long posterior to the establishment of the feudal system.

Limitations were placed on the right of tenants to common which probably did not originally exist.

<sup>7</sup> ‘Hist. Normandy and England,’ iii. 603.

holding in the manor. He was thus enabled to turn out on the waste only those cattle necessary to him in husbandry, as were *levant* and *couchant* on his land. He could cut estovers only to repair an existing house, and so forth. This was probably the amount of use that he had originally made of his right, and it was taken as a precedent to show the amount to which he was entitled. As he had originally no temptation and no necessity to grant his privileges to another, and there was consequently no precedent for his so doing, it became a regulation that no tenant could license another person to take the benefit of his common. When the rights of the tenants were thus pared down, from the size to which they had a tendency to grow, to their original extent, it was found that the waste was large enough, both to allow of these rights being exercised, and also to yield supplies of corn, if part of it was brought into cultivation. But who was to have the privilege of cultivating it?—in other words, as whose property was it to be recognised—as the sole property of the lord, or of the tenants, or as the common property of them all?

On the side of the lords, there was much to be alleged, which, to those who had imbibed their notions of property principally from the Civil Law, would seem to show that the *dominium* or *proprietas* in the land belonged to them. These men looked at the words of the original grant, and found them absolute and unconditional, *dedi et concessi*. This, then, they took to be indisputable evidence of a gift to them of the entire interest in the land. They saw that the lands of the manor had been allotted to the tenants by the lords in the same form of words; that the tenants had performed certain services to the lords in respect of their lands, and had, on receiving them, become their vassals. They saw that it was to the lord, that the general management and control of the land had been committed. It was the lord who held the manorial court; they consulted ‘Domesday,’ and it was in the name of the lord that the manor stood. On the other hand, there seemed to be no evidence, that the tenants of the manor had any claim. The lord was regarded as having, of his own free will, granted to

Reasons which led the Legislature to regard the lords as owners of the soil.

them the lands they held; so far, they were actually indebted to him, and must thank him for his bounty. Even supposing that they had claims upon him, these claims had been satisfied by the grants that had been made to them. As far as there was a precedent for the tenants exercising a right of common over the waste, so far this claim was to be allowed. They had been permitted to acquire a servitude over the land; but, as the land had been granted to the lord, and he had not granted it away, the ownership in the land remained in him. It was not considered that, at the time of the grant, the claims of the lord had been satisfied by the portion he had appropriated as his demesne, just as much as those of his followers had been by the lands allotted to them. It was not considered that this was evidence that the grant was intended for the benefit of the followers as well as of the lord himself, and that the waste had been left unappropriated, simply because the lands appropriated were as much as the means of cultivation possessed by the lord and his tenants together enabled them to cultivate, and because they supplied sufficient corn for their maintenance at the time of the distribution. Nor was it thought just that the principles, that regulated the distribution when the grant of the manor was first made should be applied a century or two afterwards, when both the requirements and capabilities of both parties—the lord and the tenants—had expanded. Only the form of the grant to the lord, and the form he had used in distributing to the tenants, were taken into consideration by a legislature composed solely of lords of manors, and in which the tenants were unrepresented. Looking to these alone, and to the relative position of the lords and tenants, the lords and the lawyers built up those theories about the feudal system which have since been held to have been acted upon in the distribution of manors. They decided that the portions which were left undistributed remained the property of the lords as absolutely as those which they had appropriated as their demesnes, and that the rights of the tenants were of an usufructuary kind only. They refused to take into consideration the circumstances under which they had been granted, and under which the lands composing them had been distributed.



Another circumstance may be considered to have led them to this conclusion. The kingdom, it might have been said, is like one vast manor. The Conqueror, on effecting his conquest, satisfied the claims of his immediate followers by granting them estates in this large manor to be held of him by military services. All, that he did not grant away to them remained, his property. Some parts of this he actually appropriated, and these became royal demesne. Other parts of the realm he neither actually appropriated to himself nor distributed to his followers. These parts were in a position analogous to that held by the waste of an ordinary manor. In after times, it may be supposed, some of these unappropriated lands became of value, so that it became necessary to decide who was to be allowed to appropriate them, as whose property they were to be regarded. Every one would answer, as the property of the Crown. If so, then, why should not the waste of an individual manor be regarded as the property of the lord of the manor? We answer, Because the king takes possession of these territories, not for his own private benefit, but as the representative, the trustee, and the head of society. What belongs to the king (*quâ* king) belongs to society at large. To the king the government of the nation is entrusted. He it is who defrays the expenses of the government. We pay him taxes in order to enable him to defray these expenses, and society resigns to him the rights that it possesses over any such (virtually newly discovered) lands for the same purpose. In allowing the king, therefore, to make such an acquisition, society does not give up its rights; it vests them in the king as its representative and trustee, and he holds them in that character for the benefit of the nation at large. The lords, it is true, had once held the position of trustee and representative to their followers, but they abdicated this post as soon as they had tried to convert into their own private separate advantage that which had been granted to them in this character; they wanted to retain the profits after having abdicated their functions. As right would it be for the king to retain the Crown lands after having abdicated the throne.

No analogy  
between the  
state and a  
manor.

The lords and the lawyers then, in the middle of the thirteenth century, bringing the principles of a foreign jurisprudence to bear upon the mode of tenure of land in this country, decided that the *proprietas* or *dominium* of the waste land of each manor was vested in the lord of the manor, though, in deference to a usage of some antiquity, they recognised the rights of the tenants to common on the waste as a servitude which must be protected. It followed, however, as a corollary to this decision, that so long as the lords left sufficient land for the full enjoyment of these servitudes, they might exercise all the privileges over the soil that ownership in land usually conferred; and the decision, being merely regarded as determining the nature of the theory involved in the feudal grant of a manor, and the statute of Merton following, as a matter of course, when once it had been decided that the original idea was to vest in the lord the sole beneficial ownership, the statute, being thus in affirmance of what came to be regarded as the original theory, has been held to be in affirmance of the Common Law. The unpopularity, however, which it met with during the Middle Ages would seem to show that the idea, which was decided to have been at the bottom of the original grant of a manor, to which idea the statute of Merton was merely a corollary, was held universally among all but the lords of manors to have no foundation in justice or in fact.

If the view we have taken of the position of lords of manors be correct, they held a position in England originally very similar in some respects to that of the zemindars in India, before the changes in the financial administration of India, which were introduced by Lord Cornwallis. They were the persons responsible to the king for the revenues of a district. To enable them to fulfil this duty they were armed with a certain judicial and magisterial authority. They were responsible to the king for the fixed number of armed men, that were due from their districts for the service of the king. To this end they were invested with power to call upon the

Statute of Merton followed as a necessary consequence the decision that the dominion of the soil belonged to the lords.

Lords of manors in England held a position in some respects very similar to that held by zemindars in India.

tenants of their districts to follow them to the war. At the same time, it must be confessed that they were invested with large proprietary rights in their districts, which the zemindars had not. They were to divide the land of their districts amongst themselves and their followers, in proportion to their respective requirements and their capabilities of cultivation. But the circumstances of their position gave them no more exclusive right to what remained, after thus distributing the soil, than was claimable by their tenants. Applying, however, as we have seen, the principles of a foreign jurisprudence to determine their position, they asserted to themselves an exclusive right of dominion over the undistributed portion; though the circumstances which they had regard to, as forming the basis of such exclusive right, were no more capable, according to the original intention of the grant, of giving them such sole right, than were the circumstances in the position of the zemindars, which were taken during the last century by a foreign jurisprudence to give to them a property in the soil, capable, according to Indian notions and ideas, of giving such property to them. But both in England and in India, the cultivator of the soil was sacrificed to a foreign legal theory. The principle, however, that the lord of the manor was owner of the soil of the waste of the manor, was clearly asserted in the statute of Merton, and has been ever since recognised by our law; and consequences, more important perhaps than were originally contemplated, have resulted from the principle thus laid down.

We consider, then, that the gist of the grant of a manor was to confer upon the lord and his followers together a joint ownership in the land of the manor, according to their respective requirements and their means of cultivation, and to make the lord the one responsible person to the king for the feudal dues and incidents in the shape of men or money. With this view, the relation of lord and vassal became established between the lord and his tenants; and the lord became thus enabled to call upon his tenants for such supplies of men and money as were necessary to enable him to meet the demands of the king. To this end, also, and

The true signification of the grant of a manor.

further to enable him to keep peace and order in his district, and to distribute justice among his tenants, in those cases which were not of sufficient importance to be brought before the king's courts, and to make regulations with regard to the internal management of the manor, the lord had power to hold certain courts. The manorial courts were three in number—the court-baron, the court-leet, and the customary court. Of these the court-baron is the most ancient. The customary court, as it concerned copyholders only, was of much later origin. Every manor necessarily had a court-baron; but only certain manors, granted to the great men of the realm, had the privilege of holding a court-leet. We will consider these courts in their order.

To every manor a court-baron is incident; “for indeed,” says Lord Coke, “that is the chief prop and pillar of a manor, which no sooner faileth than the manor falleth to the ground.”<sup>c</sup> Thus, in a *quo warranto* for holding a court-baron, it is sufficient for a man to plead that he has a manor. Formerly courts-baron, in many instances, had both a civil and a criminal jurisdiction.<sup>d</sup> To the former the words *sacha* and *socha* were applied—the former signifying the power and privilege of exercising jurisdiction, the latter the limits within which the jurisdiction was exercised.<sup>e</sup> The criminal jurisdiction was termed *infangthefe* and *outfangthefe*. By the Magna Charta of Henry III. c. 17, sheriffs of counties, constables of castles, escheators, and coroners, were prohibited from holding pleas of the Crown. Yet Lord Coke says:—“Albeit the franchises of *infangthefe* and *outfangthefe*, to be heard and determined within courts-baron belonging to manors, were within the same mischief, yet we find, but not without great inconvenience, that the same had continuance after this Act. But either by this Act, or *per desuetudinem*, for inconvenience, these franchises within manors are antiquated and gone.” Although courts-baron have lost their criminal jurisdiction, their power to decide civil cases, in frequent instances, still remains. In ancient times the limits of this jurisdiction were extensive; they determined all injuries, trespasses, debts,

The court-baron.

<sup>c</sup> 1 Cruise Dig. 32.

<sup>d</sup> Ibid.

<sup>e</sup> Ellis's 'Domesday,' 273.

<sup>f</sup> 2 Inst. 31.

and other actions where the debt or the damages did not exceed forty shillings; they inquired concerning all persons who owed suit to the court as tenants of the lord of the manor, where they dwelt, their age, &c.; they inquired generally with regard to the lord's feudal dues; they inquired into the state of common-lands within the manor, and how the rights over the same were exercised, concerning trespasses on the same, and generally as to the state of the manor.<sup>g</sup> The court is composed of the steward and the freeholders, who hold their lands by fealty and suit of court, and who are bound by their tenure to attend and assist the steward in the administration of justice. In a court-baron the freeholders are the judges, and such a court cannot be held unless there are at least two freeholders within the manor; these freeholders cannot be created at the present day. The court still has the power of determining, by writs of right, all controversies relating to land within the manor; a court-baron, however, has no authority to hold pleas of freehold, its usurpations in this respect having been put a stop to by 15 R. II. c. 12. The court may also hold pleas of any personal actions of debt, trespass on the case, or the like, when the debt or damages do not exceed forty shillings.<sup>h</sup> The court has jurisdiction only within the limits of the manor, so that it is a good exception to the jurisdiction of a court-baron to say that the contract was made in another town; nevertheless any stranger who comes within the manor may be sued there in debt or trespass under forty shillings.<sup>i</sup>

Another court, which is not necessarily incident to a manor, but which is derived from the sheriff's tourn, and which was created by a grant from the Crown <sup>The court-leet.</sup> to certain lords of manors for the ease of their tenants, in order that they might have justice administered to them at home, was the court-leet. This was a court of record, which a court-baron was not; and it possessed the same jurisdiction within its limits as the sheriff's court had in the county.<sup>k</sup> "It was ordained for the punishment of offences and annoyances to the commonwealth within the precinct of that; and the articles

<sup>g</sup> Kitchen on Courts, pp. 6, and 108 to 116.

<sup>h</sup> 1 Cruise Dig. 33.

<sup>i</sup> Kitchen, 148.

<sup>k</sup> 3 Cruise Dig. 258.

and pains are obtained to that end ; and it is called the view of frank-pledge, for that the king there may be certified by the view of the steward how many people are within every leet, and also to have account and view by the steward of their good government and manners in every leet ; and also the leet was ordained to have every person of the age of twelve years, which had remained there by a year and a day, to be sworn to be faithful and loyal to the king ; and also for that the people there might be kept in peace and obedience."<sup>1</sup> The court was held by the steward of the manor and a jury, which was to consist of not less than twelve men.<sup>m</sup> The province of the court was twofold. The greater offences, as murder, treason, burglary, rape, &c., they inquired into and presented offenders ; they possessed no power of punishment, however, in such cases. But they had full jurisdiction in cases of false weight, selling bad food, and other misdemeanours ; and also made inquiries as to trespasses, rights of way, customs, treasure-trove, villeins, and matters generally pertaining to the manor ;<sup>n</sup> in the last-mentioned criminal cases, the court had power both to inquire and to punish. It seems probable that the criminal jurisdiction of this court fell into abeyance from the same cause that put an end to that of the courts-baron.

A third manorial court was the customary court,—and this concerned copyholders only ; and as there could be no court-baron without freeholders, so there could be no customary court without copyholders or customary holders.<sup>o</sup> In the customary court the lord or his steward is the judge. This court from being the least has become the most important ; as, while the jurisdiction of the courts-baron and courts-leet has fallen into disuse, the whole business respecting admissions to and surrenders of copyhold land is still transacted in the customary court.

It was necessary that the manorial courts should be held within the limits of the manor ; unless the lord could show a custom to hold a court within one manor for several.<sup>p</sup>

The customary court.

The manorial courts—where to be held.

<sup>1</sup> 6 Kitchin.

<sup>m</sup> 13 Kitchin.  
<sup>o</sup> Co. Litt. 58 a.

<sup>n</sup> 16 to 24 Kitchin.  
<sup>p</sup> Co. Litt. 58 a.

These courts during some portion of our history undoubtedly exercised a very beneficial influence. Their decline may be traced to various causes. First, <sup>Decline of the manorial courts.</sup> the decline of the feudal system left the tenants very little disposed *primâ facie* to submit to the jurisdiction of institutions so essentially feudal. The doctrine of uses, again, must have prevented them in a great measure from exercising that complete control over the internal arrangements of the manor which they had once possessed. But the death-blow of their influence must have been the statute 12 Car. II. c. 24, by which military tenures, with all their incidents in the way of reliefs, aids, wardships, marriage, fines on alienations, &c., were swept away, so that the courts were deprived at one stroke of the chief province of their jurisdiction. The courts-baron and courts-leet are now but of small importance. The criminal jurisdiction now rests with the magistrates in their sessions, and the civil in most cases with the county court. The first County Court Act of the present reign, however (9 and 10 Vict. c 95), contains one or two sections referring to the courts-baron. The 13th section makes provision for certain lords of manors, having rights of appointment under various Acts, which the statute in question repeals, and the 14th section enacts that the lord of any hundred or of any honour, manor, or liberty, having any court in right thereof in which debts or demands may be recovered, may surrender to her Majesty the right of holding such court. No person, however, is to be entitled to claim any compensation under this Act by reason of any such surrender. It is at the same time provided, that the surrender of the right of holding any such court for the recovery of debts and demands shall not be deemed to infer the surrender or loss of any other franchise incident to the lordship: and that the court thereof may be holden for all other purposes, if any, incident thereto. Considering that no compensation is offered to lords of manors who surrender these franchises, we may infer that they are not regarded as of much importance at the present day.

When we consider the position in which a lord of the manor was thus placed, the extensive rights of jurisdiction exercised by him, the large demesnes he <sup>Real significance of the feudal</sup>

system, and decline of feudalism in England. retained in his own hands, his consequent wealth, the number of his tenants, who owed him various feudal services, who took the oath of fealty to him, were suitors in his court and regarded him with a certain amount of veneration; it is sufficiently obvious that he must have been a person of great importance. In times when the power of the central government was little felt in remote districts, a great feudal lord exercised an almost unlimited sway within his manor. It was he alone who stood between the king and the common people. It was to the great lords that John was forced to submit: it was to them that he granted the Great Charter. They maintained a war against Henry III., they extorted charters from Edward I., they deposed Edward II. But in the course of the next reign, the commons began to make their power felt. Even in this reign, however, struck as we are at the bold and manly conduct of the Parliament, which has gained in our annals the name of 'The Good Parliament,' we must still confess that it was owing to the support of the Prince of Wales that they were able to make such a stand against the king; as, after his death, the regulations which they had made were set aside, the Duke of Lancaster became at the head of affairs, and their speaker Sir Peter de la Mere was thrown into prison. In the next reign, however, the Commons still further consolidated and extended their power, and there was a general yearning after liberty among the lower orders of the people. The end of the fourteenth century was a time when the sense of political slavery began to be keenly felt. "It was an age," says Hallam,<sup>1</sup> "of greater magnificence than those which had preceded, in dress, in ceremonies, and buildings: foreign luxuries were known enough to excite an eager demand among the higher ranks, and yet so scarce as to yield inordinate prices, while the landholders were, on the other hand, impoverished by heavy and increasing taxation." The great lords consequently became more careful to insist upon their manorial and other rights, and to exact their feudal profits with greater strictness. In early times, they may be said to have been to some extent the representatives of the people. Whether the king's barons

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<sup>1</sup> 'Mid. Ages,' c. viii. part III.



were the whole body of tenants *in capite*, or only some of the larger landholders amongst them, is a moot question which need not here be discussed. But whatever their qualification, it was through them alone that the power of the king was curbed. In days when the king's revenues depended chiefly on the moneys due from his feudal tenants, it was on them and (through them) on their tenants that the burden fell. When therefore a baron resisted an excessive aid, he resisted on behalf of his tenants as well as himself. When the barons insisted upon a redress of their grievances, it was made a point in the charter that they should extend the same redress to their sub-tenants. But when the feudal feeling of subordination, that had once existed between the lord and his tenants, had in great measure died out, and when the Commons of England, now risen into opulence and forming a recognised estate of the realm, began to be conscious of their own power, the superiority of the feudal lords was not so readily submitted to as formerly; and when, together with this spirit of disaffection on the part of the lower classes, came the attempts of the upper classes to insist on the letter of the law and to exact as much from their tenants as they could, the people were driven to those outbreaks which mark the reign of Richard II. Though these outbreaks were put down with a high hand, and though the nobles annulled the promises of greater freedom which the king had given, we may regard them as the first outbreak of a disaffection, which had during the fourteenth century been growing up, and as showing the decline of the old enthusiasm of the spirit of chivalry, and the first dawns of the new enthusiasm, which has lasted to our own times, the love of liberty.\*

The feudal relation and the feelings connected with it had indeed died away in the course of the fourteenth century. For about a hundred and fifty years after the Conquest, the sentiments and ideas of feudalism

Proof of the decline of the feudal system.

\* Madame de Staël (de l'Allemand, chap. 4): "A toutes les grandes époques de l'histoire, les hommes ont eu pour principe universel d'action un enthousiasme quelconque. . . . La marche philosophique du genre humain paraît donc devoir se diviser en quatre ères

différentes: les temps héroïques, qui fondèrent la civilisation; le patriotisme, qui fit la gloire de l'antiquité; la chevalerie, qui fut la religion guerrière de l'Europe; et l'amour de la liberté, dont l'histoire a commencé vers l'époque de la réformation."

had taken good root in England. Our law became moulded in accordance with them, and has ever since retained a strongly feudal character. But from an early period in the thirteenth century the system began to decline. There is no stronger evidence of this decline, than the relaxation of the law with respect to the alienation of land. The relation between the lord and his vassal had been originally of a very intimate and personal character, and it was at the same time so closely bound up with the tenure of land, that the tenure was the source from which the relation sprang. It followed therefore, that, if a lord transferred to another the seigniorship over the land of his manor, or if the tenant disposed of the land he held in the manor, the same close relation sprang up between the new parties. As it was, on the one hand, thought hard that the lord should be obliged to accept a new tenant, whose valour and fidelity he had not tried, but with whom, nevertheless, he would have to maintain a very intimate relation; so, on the other hand, was it esteemed unreasonable to subject a feudatory to a new superior, to whom he must transfer his fealty, but with whom he might have a deadly enmity. It was a fixed rule, therefore, that no alienation could be made by either party without the consent of the other. This consent was known by the name of attornment: and it is evident that, as long as the intimate relation between lord and vassal subsisted, so long must the doctrine of attornment be maintained. The doctrine itself long remained in our law, and though it was found exceedingly troublesome, was not abolished till the reign of Anne. But it became practically of small real importance, as soon as the right of alienation of land became recognised. This was done partially by the charter of Henry III., which allowed a man to aliene half his land; but all restrictions upon alienation were recognised as abolished by the statute passed in the reign of Edward I. (A.D. 1290) called the statute *Quia Emptores*; whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion; subject only to the provision, that all conveyances of the fee should be to hold of the chief lord and not of the grantor. It thus became a lawful practice to aliene lands, the tenant merely paying a fine upon alienation to his lord. He could

consequently at any time give to the lord a new tenant; though he was liable, on the other hand, at any time, to have a new lord thrust upon himself. We may therefore conclude that, in the end of the thirteenth century, the close feudal relation that had once subsisted between lord and tenant existed no longer, and that the feudal sentiments and the feudal system were dying out.

The decline of the feudal system in England may be traced to several causes. It was a plant of foreign growth, introduced into our island in its maturity; it had not, so to speak, grown up amongst us spontaneously from natural causes, as it had done in other countries.

Causes of the decline of the feudal system.

In a rude age, feudalism readily supplied "the cheap defence of nations," and it thus was well adapted to continental countries, continually exposed to alarms of invasion; but our country, with the exception of the northern counties, has since the Conquest hardly ever been invaded by a foreign enemy, so that feudalism had but little opportunity of rendering us this service. It was, at the best, not adapted to carrying on any aggressive operations beyond a short and sudden inroad; and, as the vassals were bound only to forty days' service, it became next to impossible for our kings to get them down to the seaside, across the water, and at the seat of war, and to employ them to any advantage, in so short a space of time. Thus it was the sea, that, with us, chiefly opposed the growth of the feudal system. Our Norman kings were consequently glad to adopt the expedient introduced by Henry II., of exacting escuage in lieu of military service; and this practice seemed so much more advantageous to both parties, that it was almost constantly followed. The relation of leader and follower in war being once put an end to between lord and vassal, one of the chief bands that held them together was broken. We find, moreover, in all countries that there has existed a kind of antagonism between the people of the towns and the people of the country. It was amongst the latter, that the feudal spirit thrived, and consequently, as the towns increased, by means of commerce, in opulence and power, they gradually subverted the power of their rivals, which lay in the country. Indeed, there is so great a repugnance between the free and independent spirit engendered by commerce, and the spirit of feudalism, that as the one gained strength the other neces-

sarily declined. The fact, moreover, that so many estates changed hands at the time of the crusades, must necessarily have left the new lords and their new vassals bound together by a tie much looser than that which had bound the old lords and vassals. From these various causes, feudalism about the end of the twelfth century began to decline in England.

The feudal system, however, did not die out in our country, before our land-law had become deeply imbued with its principles. It certainly does not seem to be at all likely that the refined notions and distinctions, which afterwards characterised the feudal law, were ever contemplated by the rude warriors with whom the system originated. Nevertheless, the lords of manors retained their power in the legislature long enough to enable them to interpret the rude feudal law, as first established in this country, wholly in accordance with their own interest. These refined doctrines, which they thus engrafted upon it, arose from the application of the principles of Roman law to a state of facts which had become established among the barbarians, without the intervention of any particular legal doctrines. The law, as thus expounded, found great favour among the barons, to whose interest it so greatly redounded; and among the lawyers, who would be glad with an opportunity of laying down broad and general principles, and of building up a theory with which so many circumstances seemed to coincide. It became a maxim then, that the *proprietas* or *dominium* of the soil (of which their warlike ancestors had probably never formed the slightest conception) belonged to the lord of the manor; and, as we have seen, the statute of Merton flowed as a corollary from this doctrine. The doctrine has been followed by other consequences which seem naturally to attend it, and to be inseparably connected with it. It has, however, been only in comparatively recent times that these consequences have become recognised as an evil, and have been severely felt by the community at large.

What we have alluded to as the natural consequences of the doctrine, that vested in the lord the ownership of the soil of the waste of the manor, to as full an extent (except that the land is subject to a

Strongly feudal character retained by our law.

Incidental consequences of the doctrine asserted in the

servitude, known in our law-French as a *profit* Statute of Merton.  
*à prendre*) as in those lands that he had actually appropriated to himself, is, that the lord was thereby recognised as possessing the same right of exclusive enjoyment in the waste as in his other freehold property. Though therefore the tenant possessed a right of common over the waste, and though this right was allowed, he was not for this reason justified in exercising any of the other attributes of ownership. It has before been stated, that he could not even justify coming upon the waste to put his cattle in, unless he put them in. It follows then, though it seems an affectation of legal pedantry to say so, that the general public have not the right, at law, to make use of the waste (merely because it is waste) for their recreation and exercise. True, they may in certain instances possess such a right; but they must have gained it by long user, so as to be able to claim it by custom. In the same way, they may have acquired such a right (which is known in our law as an easement) over any inclosed lands. But it makes no difference, in strict legal theory, whether the land over which they claim to exercise this right be inclosed or open, whether it be cultivated or waste; in either case, they claim it over the freehold property of an individual. The lord possesses the freehold of the waste, and with it all the attributes of a freehold. A right to a full and complete enjoyment of the waste is therefore presumed in his favour, and the burden of proof is upon the public to show that they have by custom acquired a right over that land, which is recognised by the law as the freehold property of the lord.

Except in cases where the lord has been desirous of exercising the powers vested in him by the statute of Merton, or where lord and tenants together have been desirous of inclosing (either by voluntary agreement or in accordance with one of the Inclosure Acts, to which more particular allusion will presently be made), it would seem improbable that full effect has ever been given to the exclusive right of the lord as against the public, which follows as a necessary incident to the doctrine laid down in the statute of Merton. The lord of the manor, even of Hampstead Heath, allows 50,000 people to congregate there on a Good Friday without offering the slightest opposition.

These consequences not felt until proposals are made to inclose the land.

Indeed, from the waste condition of these commons, and from the circumstance that, except in the immediate neighbourhood of large towns, no damage can be done by the persons who resort to them, it does not seem probable that the lords will ever care to insist upon the rights theoretically given them by the law, to exclude the public. So long then as the land is left uninclosed, the rights claimed by the public are generally compatible with the enjoyment of the land by the lord. As, however, proposals are now frequently made for inclosures under the Inclosure Acts, for the benefit of both lords and tenants, and as lords of manors are desirous, where practicable, of exercising the powers vested in them by the statute of Merton; it becomes of importance to consider the validity of the rights claimed by the public to use waste land for their exercise and recreation, and to ascertain the extent to which such rights are recognised by the law; and, as a correlative question, the extent to which the rights of the lords to an exclusive ownership should, out of deference to the doctrine laid down in the statute of Merton, be allowed.

It has only been in comparatively recent times that the importance of this question has begun to be felt. It is even now almost unfelt in country districts. But in the neighbourhood of our large towns, where population has increased so many fold, while the area of land available for the public use has suffered almost as great a decrease, the extreme inconvenience of inclosures is severely felt. Our ancestors had naturally no thought about the matter; nor was the inconvenience of the theory that gave to the lord's ownership in the waste all the attributes of freehold property foreseen by them. It was regarded as a public good if more land were brought into cultivation than before; and society, with this view, and feeling that there was amply sufficient land left for the use of the public, was prone to rejoice rather than to murmur at every inclosure that was made. Now, however, that we import a large quantity of our food from other countries, and that we are perpetually becoming more and more cramped for room in our little island, proposals for any fresh inclosures, especially in the neighbourhood of our large towns, are justly regarded by the public with distrust and

Question of inclosures has of late years assumed a new aspect.

dissatisfaction. How it is that the question has now become with us one of vital importance, which, two centuries ago, could have raised no sort of apprehension, will be sufficiently apparent, when we consider the great steps that have been made in inclosures and cultivation, and the great increase of population during the two past centuries.

The area of England and Wales is estimated at thirty-seven millions of acres, and of these it was calculated that at the accession of James II. not more than one-half had been brought into cultivation; the remainder was The state of England two centuries ago. believed at that time to consist of moor, forest, and fen. Vast tracts of country, especially in the north of England, which are now cultivated with as much care as a garden, which are divided by hedgerows and dotted with populous villages and country mansions, were at that period entirely waste. In the south also, even within sight of the smoke of the capital, vast tracts of country lay uncultivated, and in all their original wildness. At Enfield, was a region of five-and-twenty miles in circumference, which contained only three houses and scarcely any inclosed fields. Over these vast tracts of country, large herds of deer and large numbers of other animals which are now quite extinct in our island, wandered.\* Yet it is probable, that hardly an acre was without a titular owner, and almost every part of this uncultivated land was subject to rights of common.

The spirit of English enterprize has been in hardly any way more remarkable than in the vast amount of capital, labour, and intelligence which has been devoted to thus reclaiming the land of the kingdom from the wildness and sterility of nature. From the accession of James II. to the accession of George II. Great change that has been made in the aspect of England in the two last centuries. we may calculate that somewhat over three millions of acres were brought into cultivation. From that period till the year 1844, no less than four thousand private Acts authorising the inclosure of wastes were passed; and under these we may calculate that at least ten thousand square miles, or upwards of

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\* See Macaulay's 'Hist. Engl.' chap. iii.

seven millions of acres, were inclosed, drained, and made to minister to the wants of society.<sup>1</sup> From the year 1844 up to the year 1864, it appears from the Report of the Inclosure Commissioners, that 433,678 acres had been actually inclosed under the Acts of 1845, while 235,515 acres were in progress of inclosure. We thus see that in the year 1841—the year when evidence was given relative to the expediency of inclosures before the Select Committee of the House of Commons—twenty-nine millions of acres were inclosed and cultivated, leaving eight millions still uninclosed. In this eight millions, is included all downs and open grounds, the Welsh mountains, the moors of the north of England, and indeed all the waste and uncultivated land of the kingdom.<sup>2</sup> The proportion of cultivated to uncultivated land had thus risen from one in two in 1685 to twenty-nine in thirty-seven in 1844. If from these eight millions of acres, which in 1844 were lying waste, we deduct 669,193 acres, the number already either inclosed or irrevocably doomed to inclosure under the present Inclosure Act, we arrive at 7,300,000, as the approximate number of acres in England and Wales still uninclosed.

As it is superfluous to point out to how large an extent society has been a gainer by this vast advance of agricultural improvements, so it seems needless to insist upon the alteration that it has effected in the aspect of the country, especially in the neighbourhood of large towns. A glance at a county map of the last century will make this great change at once apparent. Judging from the past rate of progress, one can hardly feel secure that there will not be some new invention, made by the never-tiring builder, or the agriculturist, to convert even the sides of mountains into either populous suburbs or waving corn-fields. The law has hitherto favoured inclosures. They have vastly increased our resources, they have allowed our population to expand, and have enabled England to advance with the great strides which she has made in the past hundred years. But

Bearings of this great change upon the question of inclosures.

<sup>1</sup> See Macaulay's 'Hist. Eng.' chap. iii.

<sup>2</sup> See evidence of Rev. R. Jones before the Committee of House of Commons, 1844.—Answer 8.



now that the necessity of retaining open spaces has become of as great if not much greater importance than inclosures—and this especially in the neighbourhood of our increasing towns—the question arises whether the policy of the law ought to continue equally favourable, and whether lords of manors have really acquired such a *proprietas* in the soil of these wastes, that society is not justified in insisting that they shall be left in their present condition.

It would be irrelevant to dispute the rights of the lord (after satisfying the claims of the commoners) to be the person who ought to be allowed to inclose for his own benefit, if the inclosure is to be made at all. To the lords and commoners, society has long ago given up the right to have the sole enjoyment of the fruits of the soil. Adverting to a distinction before alluded to, it would be unjust to claim for the public any *profit à prendre*, or anything more than an easement, in the shape of a right to wander at liberty over the land. As, on the one hand, society wishes to retain this easement in peace, so, on the other hand, it has no desire to interfere with the rights to the profit of the land, which have long been vested in individuals.

It is not disputed but that, if the inclosure is to be made at all, the lord and the commoners are to make it for their own benefit.

Evidence was given before the Committee of the House of Commons in 1844, of some of the extraordinary benefits which have resulted from inclosures. Cases were mentioned of land, which formerly lay idle and unproductive, covered with gorse and scanty herbage, which was then well drained and cultivated, and covered with rich pasture or crops of corn. Some land near Godalming, which had then been inclosed about thirty-five years, was said to be letting at from 15s. to 30s. an acre (a considerable portion of it fetching the higher figure) whereas, before the inclosure, the gross produce had only amounted to from 5s. to 10s. per acre in value. The same witness also spoke in high terms of the great improvements which the inclosure had produced in the town of Godalming itself, and in the character and position of the inhabitants. Ground that had before been a marsh, so that it was of but little value for any purpose, and indeed was a cause of unhealthy vapours rising, was then a well-cultivated,

Advantages in some respects of inclosures.

well-drained, and highly productive piece of country.\* Looking at the matter from the same agricultural point of view, there is undoubtedly very great inconvenience in land continuing to lie waste and unproductive, and to be (as most commons virtually are, so far as the right to take the profits is concerned) the subjects of joint property. In some respects also waste lands are, even in a generally social point of view, productive of evil rather than good. It being the interest of nobody to cultivate the land, it is allowed to remain comparatively unproductive. Various people who have no right to common encroach upon it, so that commons are perpetually becoming surcharged. In consequence of this, and in consequence of the danger to be apprehended from diseased cattle being fed upon the common, those who have the right frequently omit to exercise it. Thus in many cases land, which, if reduced to a proper state of cultivation, would be very productive, becomes, for want of clearing and of proper drainage, comparatively useless even to those to whom it belongs. Again, it has been found that the conflicting pretensions of the lords and the commoners gave rise to a great amount, if not of litigation, at any rate of ill-feeling; and it was found that, if large farmers attempted to keep out of the waste those to whom no right of pasture belonged, they only brought odium upon themselves without accomplishing their purpose. Waste lands, moreover, have become in many cases the favourite resort of gipsies and other persons of no settled occupations, who usurp the liberty of squatting on the common, and of living an unprofitable and precarious life there, so as to be a nuisance to the neighbourhood.† From all these circumstances, we may conclude that waste grounds, especially in rural districts, are, for agricultural purposes, comparatively almost useless, and are in many instances prejudicial to the country.

Fully sensible then of the advantages of inclosures, and the evils, in some respects, of allowing land to lie waste, the

\* See evidence of Mr. Keen before Committee of 1844, pp. 61 *et seqq.*

† See the evidence of Rev. R. Jones, before the Committee of the House of Commons in 1844. He said (Answer 71) that he has no opinion of the people living on the edge of the common; they are generally the most immoral and

worst part of the rural population.

Mr. Edwards also spoke of the low character of the residents on the commons, who are for the most part sheep-stealers.

This opinion was also given by Mr. Keen, Mr. Williams, and Mr. Graham.

policy of the Government has hitherto run strongly in favour of inclosures; the more especially as, until recently, the advantages have had but few disadvantages to counterbalance them. In most cases the lords made use, long ago, of the powers given them by the statute of Merton, and few inclosures have been made under it in recent times, except in cases, where agricultural have been turned into building districts, in the neighbourhood of large towns, and the rights of the commoners have consequently, from long non-user, lapsed to such an extent that the lord can approve a great portion of the waste and yet leave sufficient to satisfy the rights of the commoners that remain. By the Common Law, moreover, as the lord and the commoners are in general regarded as the only persons interested in the land, the common may be inclosed by mutual consent. This has in some cases been done. It is, however, obvious, that to gain the consent of all the persons interested must in general be a very difficult task. Some perhaps are legally incompetent to assent; others are absent from the country; others again there may be, whose rights to common are not known to exist. And unless the consent of all the parties interested be obtained, the inclosure is invalid. There have consequently been but few cases where commons have been thus inclosed by mutual consent, where the new proprietors have not been liable during the next twenty years to have their fences thrown down by some commoner, either omitted from or unbound by the instrument authorising the inclosure. The lord's right of approvement being then exhausted, and the partition of the common in satisfaction of the lord's rights to the soil and the rights of the commoners to the herbage, being involved in so great difficulty, it became necessary that the Legislature should interfere, if inclosures were to be made at all.

It accordingly became the practice to obtain a separate Local Act, to authorize each individual inclosure, so that the dangers to be apprehended from the whole number of consents not being obtained might be obviated. Frequent recourse was had to Parliament by lords of manors for these Acts even before the year 1685. In the reign of Charles II. an Act was passed authorising the in-

Difficulties attending inclosure by the Common Law.

Local Acts, authorising inclosures, granted by Parliament.

closure of the Bedford Level, and the whole of that large tract of land was accordingly drained and brought into cultivation. From the necessity which thus arose for an Act of Parliament to authorise the inclosure, the Legislature has been enabled to use its discretion, and to consult the general public advantage, with respect to any proposals that might be brought before it. And though the Legislature has always hitherto inclined to favour inclosures, it has become enabled steadily to maintain its right to regulate them, and to change its general policy for one of general disfavour, in case that that, which used to be regarded as a good without alloy, should come to be considered prejudicial to the interests of society.

At the close of the last century, when England was involved in war with half the world, and was not only to a great degree impoverished by taxation, but had also to send large sums of money out of the country in order to procure corn, and when consequently prices were very high, the Legislature became more desirous than ever of facilitating inclosures, hoping that, by bringing a large additional quantity of land into cultivation, it might be able to increase the supply of food. The sum paid for the corn that was imported during the last three years of the last century was 7,000,000*l.* sterling, and this was considered by the political economists of the time as turning the balance of trade against the country. On the other hand, it was found that the expense and difficulty incurred in procuring a separate Act to authorise such inclosures were so great as to prove a formidable obstacle to any further improvement being made in this direction. When the Local Acts became so frequent and their utility so apparent, it was determined, for the purpose of reducing the expense of carrying them through Parliament, to consolidate the principal clauses, which it had been found necessary to insert in the respective Local Acts, into one statute. This was done by the General Inclosure Act, 1801—the 41 George III. c. 109. It will be observed that the necessity for a separate Local Act for each inclosure still remained; the statute only aimed at making the respective Acts more easily procurable. The Act begins by appointing commissioners, who are to inquire into the boundaries of parishes in which the wastes to be

Further facilities granted by Parliament up to 1845.

inclosed are situated ; to survey, measure, plan, and value all land to be allotted or inclosed ; to require an account in writing of all claims of common on the land in question ; to provide for the maintenance of roadways across the waste. They are after this to publish their awards, allotting to all the people interested pieces of waste in proportion to their interests ; these pieces are to be fenced off, and are to become the freeholds of the proprietors in lieu of their rights of common, which are hereby extinguished. The Act 6 and 7 Will. IV. c. 115 has reference simply to open and common arable fields, and does not apply to the lands that are popularly known by the name of commons.

Thus, up till the passing of the General Inclosure Act, which is now in force, there was no way of inclosing a waste, other than by procuring a special Act of The Act of 1845. Parliament. The expense of this mode of procedure was intolerable, and some cases are given in evidence before the Select Committee of 1844, in which the expense has equalled and even surpassed the value of the land to be inclosed. The necessity became apparent, that if inclosures were to be made profitable to the parties interested and to the country, a less expensive method of procedure must be adopted. Accordingly, the General Inclosure Act of 1845 (the 8 and 9 Vic. c. 118) was passed to place the whole management of inclosures in the hands of commissioners, and abolish the necessity of a separate Act of Parliament in each individual case. This Act has subsequently received several amendments, but its general features remain unaltered.

The Act divides\* all lands which are to be subject to it into two classes. The first class comprises what are popularly termed commons (lands upon which no severalty rights exist) ; the second class, those fields upon which severalty rights do exist during a certain portion of the year (which are then cultivated by the owner), but which are used in common by persons other than the owner during the remainder of the year. The lands of this second class are generally known as stinted pastures, but are not of much importance to our present subject ; as, from the The Act of 1845 makes the consent of Parliament a necessary preliminary.

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\* Sec. 11.

fact that they are cultivated during a great portion of the year, the general public commonly make but little use of them. With regard to the former class (under which would fall the wastes of manors and all lands upon which rights of common may be exercised at all times of the year, and which shall not be limited by number or stints), it is provided, that no lands falling under this class, shall be inclosed without the previous direction of Parliament.<sup>a</sup> Lands of the second class were by this Act capable of being inclosed without such direction; this exemption, however, was put an end to by the 1st section of the Sixth Amendment Act of 1852; so that now the previous direction of Parliament is a necessary preliminary to every inclosure; and the necessity is now at an end for the special provisions made by the 14th section of the Act, that the consent of Parliament shall be necessary to authorise the inclosure of any lands within fifteen miles of London, and certain shorter distances from other large towns.

The Act next provides, that the interest which the lord of the manor has in the waste, beyond the rights which he enjoys in common with the commoners, shall be estimated,<sup>b</sup> and the interests of the other owners shall be calculated from the poor-rate assessments where possible.<sup>c</sup> Upon application by one-third in value of the parties interested—the value being thus estimated—the commissioners are to inquire into the expediency of the proposed inclosure, and report upon it to Parliament. The ownership of the lord of the manor in the soil is, however, distinctly recognised by the Act, as it provides that in every case he shall be at liberty to veto the inclosure.<sup>d</sup> If Parliament consent to the inclosure, the commissioners are to appoint some competent person to value the land, and to allot it in proportion to the interest of the parties concerned. The commissioners have also power to arrange both the public and the private roads that are to be made over the land; to set out some part of it, if they see fit, as a regulated pasture, for the benefit of those whose claims are hardly large enough to entitle them to an allotment, and to decide upon the rights to minerals, &c., under any land

Further provisions of the Act.

<sup>a</sup> Sec. 12.

<sup>b</sup> Sec. 23.

<sup>c</sup> Sec. 22.

<sup>d</sup> Sec. 29.

which they may see fit to leave as a regulated pasture subject to certain rights of common.

These are the main provisions of the Act with reference to the rights of the lords and the commoners, the only parties who are regarded in general at Common Law as possessing any property in the common. It will thus be seen that the Legislature has left the statute of Merton unrepealed. All that has been done has been to facilitate inclosures, where neither the statute of Merton could authorise the lord to inclose, nor a complete mutual agreement between the lord and the commoners could be effected. In any case, however, where it is competent to the lord to inclose under the statute of Merton, or where the lords and commoners mutually agree to inclosure, no recourse need be had to the Inclosure Commissioners, and consequently the inclosure in such cases may be effected, unless there be special circumstances to prevent it, without the intervention or the sanction of Parliament.

Why, then, it may be asked, has Parliament thus left inclosures under the statute of Merton or by mutual agreement beyond its immediate control, while at the same time it has provided that the consent of the Legislature shall be necessary to every inclosure effected by the commissioners? The reason of this omission seems to be, that so few inclosures have been effected of late years in either of these two ways, that Parliament did not think it worth while to interfere; and those who have been most strenuous in opposing inclosures, have perhaps considered that the public interest was sufficiently guarded by the difficulty attending any inclosure effected in either of these ways. Certain circumstances, however, have proved favourable to inclosures being effected in these modes, so that greater danger seems to be apprehended from them than has hitherto existed, and the necessity for putting them under the same restraint as inclosures to be made under the Act of 1845, becomes apparent. This too, the more especially as the statute of Merton has of late years come into operation, most particularly in the neighbourhood of large towns. Indeed it is here, more than anywhere else, that circumstances have conspired to make it possible for the lords to inclose without

The general  
object of the  
Act.

No consent of  
Parliament necessary in case  
of an inclosure under Statute  
of Merton, although it is  
daily becoming easier to inclose  
under that statute.

violating the rights of the commoners. So much of the land that lies around a waste in the neighbourhood of a large town and that forms part of the manor, is sold for building purposes, and becomes inhabited by a wealthy class of people who do not care to make use of their common-rights, that the rights of common appendant or appurtenant to the land are in perpetual danger of lapsing. Thus the rights of common in some places are almost extinct; in others they are of a very unimportant character. Fifty years ago, perhaps, the lord had approved as much of the waste as the statute of Merton permitted him, and had left only just enough to satisfy the then existing rights of common; now, however, that the commoners have so diminished in number and are so careless of exercising their rights, he may perhaps be able to inclose a much larger portion, and still leave sufficient common for the few commoners that remain. Thus it is asserted by the lord of the manor of Tooting, that there are but two persons left who have rights of common on the waste; and, though this is strenuously denied by the persons living around, still it must be confessed that the circumstances of the neighbourhood where many large houses have lately been built, the wealthy inhabitants of which would not have been likely to have exercised their rights of common, seem to make it appear likely that many rights of common over the waste have lapsed. On the adjoining common of Wandsworth, numerous inclosures have been made under the statute of Merton. In the case of this common also, there can be no doubt that many rights of common must have lapsed owing to the fact that a great quantity of land to which a right was attached has been used for building, and that the people living in the houses that have thus been built would in all probability attach no value to a right of common on the waste. The rights of common have thus lapsed, and the lord of the manor, being recognised by the law as the owner of the soil, gains all the advantage of their so lapsing. It is also evident that the smaller the number of those who have rights of common becomes, the easier it must be to effect an inclosure by mutual consent. If, however, Parliament has a right to prohibit an inclosure being made under the Act of 1845, it must surely possess a right to forbid inclosures being made under the statute of Merton, or by mutual



consent, in cases where the public interest is likely to be prejudiced. And, as the difficulty of inclosing in these two ways is daily becoming less, it does not seem expedient that the opponents of inclosures should any longer trust to their intrinsic difficulty as affording them sufficient protection; but that they should seek an Act rendering it necessary to obtain the consent of Parliament before inclosing any waste land, in order that the Legislature may have an opportunity of putting its veto upon it, if it be considered prejudicial to the interests of society.

What the public interest is with respect to those open spaces that still remain, and more especially those that are in the neighbourhood of towns, seems too obvious to require illustration. The advantages of inclosure, and so of bringing more land into cultivation, are undoubtedly great; but this is true only up to a certain degree, and we now seem to have reached that point at which such advantages are more than counterbalanced by the evils resulting to the public from being thus deprived of its heaths and commons. Although, therefore, it is in some respects a public benefit to bring as much land under cultivation as possible, still, looking at the question as one of general public policy and convenience, it is equally of importance that a large proportion should remain uncultivated. We till the ground to produce food; but there is something else required as well as food, to insure health and comfort to our large and growing population. We may, and indeed do, draw a large proportion of our supplies in this respect from other countries; but it is only at our own doors that we can look for the other necessary conditions of health. Fresh and pure air, spaces of ground where the hard-worked man may take his exercise, are commodities which are not to be found within the precincts of our large towns, and which cannot be imported from foreign countries. But it is unnecessary to insist much upon the importance of commons in this respect, as no one will be disposed to dispute it. Besides their importance for mere exercise, they afford the only opportunity for various games, which it should be the aim of every one to encourage, as tending more than anything to promote physical strength, a sense of honour, and all the manly qualities which we generally boast of as the charac-

The public interest in wastes — what it now is.

teristics of Englishmen. Moreover, commons in the neighbourhood of large towns afford the only space where the volunteer corps, whose paramount importance is now universally recognised, can be effectually instructed to execute manœuvres upon a scale that would enable them to be of service if brought into action. Upon all these grounds then, in times like the present, when our large towns are perpetually increasing their limits and incorporating as part of themselves the rural districts around them, it seems of the highest importance that stringent restrictions should be put upon the inclosure of commons, and that some space should be left, and that more especially near our large towns, where the townsman can in some degree enjoy the beauties of nature, and breathe a fresher and purer air than he can get in the midst of the city, to which he is confined the greater part of his time.

With respect to the interests and requirements of the public, there is obviously a vast difference between the case of a waste in the midst of a rural district and one in the neighbourhood of a large town. In either case, if landowners choose to insist on their strict legal right, people who have no land of their own would in general be restricted to the use of the highway only for their exercise, and to a comparatively confined space for their recreation. In rural districts, however, this could very rarely be the case, and most people have almost unlimited license to go where they like, provided that they do no harm; and as there are but comparatively few to avail themselves of this privilege, landowners naturally prefer allowing it, rather than incur the odium of perpetually prosecuting people for trespass. In the neighbourhood of a large town, however, were such a privilege allowed, it would, it is alleged, be so extensively used that, in the case of cultivated lands, considerable harm must necessarily be done; and it is consequently only in waste and common lands, which lie unclosed and uncultivated, that this privilege is recognised. Again, in rural districts there are so many footpaths over open fields and through woods, that a man can enjoy at will the beauties of nature, and the freedom and exhilaration of spirits that seem incident to walking over a large space of open ground, without becoming a trespasser. More-

Difference between a waste in a rural district and one near a large town.

over, people in the country who are without land of their own, generally pass the greater part of their time in out-door employments, so that they have no need of a large space of ground to stroll or ride over; whereas the inhabitants of a large town are engaged for the most part in sedentary occupations, and in the course of their ordinary avocations have but little opportunity of gaining fresh air and exercise.

In claiming, then, that the Legislature should be as careful in checking inclosures under the statute of Merton or by private agreement, if they appear likely to prejudice the interests of the public, as it is with regard to those that are to be effected by means of the statute of 1845, we come now to consider how far the law has made provision for the interests of society in these wastes; and how far the Legislature has protected, in the statute of 1845, the rights given to society by the law; and the still larger claims made by society with respect to using those places that have always lain waste and uncultivated, for purposes of exercise and recreation.

What provision has been made by the Common Law and the Legislature for the rights of the public?

It may seem strange, but it is undoubtedly true, that persons are in most cases liable to be prosecuted as trespassers when they take their pleasure upon the large open grounds known as commons or downs. They have, except where they have gained such a right by prescription or custom, no right by law to invade the grounds in question. The soil of these lands is, in the eye of the law, the private property of the lord of the manor. True, it is subject to a great many rights belonging to the commoners, but that is merely a question between the owner of the soil and the commoners; the rights of the lord as against the public are a perfectly distinct matter. And even a commoner has no right or interest in the common whatever, beyond the mere right to take the pasture with the mouths of his cattle. He has no more right as a commoner to the use of the common for his enjoyment, merely because it is a common, than he has to any other part of the manor. It seems then to follow, *a fortiori*, that indifferent persons can have no right at all, at Common Law, to the use of the waste, merely because it is lying open and uncultivated, and because they have been

At Common Law, in general, the public has no right to the enjoyment of wastes.

accustomed to resort thither for recreation and exercise, unless they have subjected it to an user so constant and regular, that it can form the basis of a prescriptive or customary right.

That there exists this Common Law right of private property in wastes, and that strangers have not (except in particular cases which we shall hereafter mention) any right to trespass on them for their recreation or exercise, is clearly asserted in the case of *Blundell v. Catterall*.<sup>\*</sup> C. J. Abbott, in giving judgment in that case, says, "Many persons, who reside in the vicinity of wastes and commons, walk or ride on horseback in all directions over them for their health and recreation; yet no one ever thought that any right ever existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil." The law, regarding the freehold of the waste as vested in the lord, gives the lord all the incidental privileges over the waste that freehold property generally confers. Thus the *prima facie* presumption of law is, that there is no right of way or any kind of easement vested in any stranger over the waste; and the burden of proof accordingly falls on any person who rides or walks over the waste, to show that he, either individually or as a member of a public body, has gained such a right. And the only way in which such a right can have been gained is by grant, prescription, or custom.

The law recognises a distinction between the claim put forward by the public to wander at will over a piece of ground and a mere right of way. Both are indeed easements, and as such are claimable by grant, prescription, or custom. In cases where an actual grant or dedication exists, no difficulty can arise, because the terms of the grant can always be referred to in order to ascertain the amount of right conferred. If, however, these easements be claimed by prescription or custom, which are by far the most general ways in which easements are claimed, we shall see, that there is some distinction between the two, and that the right to

Illustration of this.

A right to use land for exercise and recreation generally is more difficult to acquire by prescription or custom than a bare right of way.

<sup>\*</sup> 5 B. and A. 315.

the unrestrained use of a waste, such as is asserted on the part of the public, is much more difficult to support than a mere right of way. For both prescription and custom rest upon possession or usage and time. The time must be of a certain length fixed by the Prescription Act, and the possession must be enjoyed neither *vim*, *clam*, or *precario*. Indeed possession, in order to confer a right by custom or prescription, must have been enjoyed openly and notoriously as of right. It must also have been uninterrupted, and must have been of such a nature, and have taken place at such intervals, as to have afforded an indication to the owner of the servient tenement that a right is claimed against him—an indication that would not be afforded by a mere accidental or occasional exercise.<sup>f</sup> Thus the occasional use of a walk or path across a man's field would be hardly such a use, as would establish the right of way there; but if the act must necessarily have been often repeated, with the knowledge of the persons acting upon an adverse right, it affords a strong presumption in favour of the right so exercised.<sup>g</sup> Thus, if people pass over a piece of ground so frequently in one direction that a footpath becomes worn, it would be presumed that it was done with the knowledge of the owner of the soil. But the same strong presumption does not seem to necessarily arise in the case of a large piece of uninclosed ground, over which people merely walk or ride in various directions for recreation and exercise. Again, in cases where a right of way is enjoyed over a field, without a fence on either side of the path, passers by will very frequently wander out of the line of path and upon the general property through which it runs. In such a case, foot-passengers, who have no right to wander, take care not to do much harm; and the owners of property, knowing how difficult it is to restrain men, without an actual fence, within a certain number of feet, have usually submitted to the inconvenience without making any attempt to repress it. But the claim of a right to the unrestrained enjoyment of the land in question, in virtue of a user of this description, could not be supported. In like manner, in the case where a strip of uncultivated ground lies between the high road and the adjoining close, the presump-

<sup>f</sup> Gale on Easements, 130.

<sup>g</sup> *Bartlett v. Downes*, 3 B. and C. 621.

tion of law, *prima facie*, is, that this belongs to the owner of the close; as the presumption also is, that the soil of the highway itself, as *medium filum viæ*, does.<sup>b</sup> Nevertheless every one is in the constant habit of walking, and, if it be level turf, more especially of riding, over the ground in question. So far, however, from this practice ripening by course of time into a right, it has become common of late for the owner of the soil to pull down his old fence and incorporate the strip of land in question with his adjoining field. The rule then being, that a user of such a nature as to afford an indication to the owner of the servient tenement that a right is claimed against him, is a necessary ingredient of custom or prescription, and it being considered that such an indication is not afforded by the general and promiscuous user exercised by the public over wastes, the law in general refuses to allow so extensive and unbounded an easement to be claimed in either of these two ways, and comes to the strange conclusion, that the public has not any right to exercise those privileges which it has from time immemorial enjoyed.

In any case, however, where the user has been of such a nature as to afford to the owner of the soil an indication that a right is claimed against him, it is clear that an easement may be established. We have already applied this rule to rights of way, and we may also apply it to the case where a right is asserted to play cricket, to dance upon the green, or to enjoy any other kind of sport. In the case of cricket, for instance, the players are standing about all day; the ground becomes worn, so that distinct traces are left of the game having been played. There is, in short, something open and notorious in the matter, which there is not, in the eye of the law, in the case of single persons walking over a heath. The same remark applies to dancing on the green. Thus, in the case of *Fitch v. Rawlings*,<sup>1</sup> a custom for the inhabitants of a place to play "at all legal sports and games," at seasonable times, on a certain piece of ground, was held good; and in *Abbott v. Weekly*,<sup>k</sup> a custom for the inhabi-

Right to play certain games is comparatively easy to establish.

<sup>b</sup> *Grose v. West*, 7 Taunt. 41, and *Storle v. Pricket*, 2 Stark, 469.

<sup>1</sup> 2 H. Blackstone, 394.

<sup>k</sup> 1 Levinz.

tants of a village to dance upon a certain close was supported, nor was the right to dance there restricted to "a reasonable time."

But even this right, the law does not allow to the general public—the whole world. It confines it to a certain class of persons, and, at the same time, places great restraint upon the exercise of the privilege it thus confers. If a man can show no grant to himself, either individually or as a member of a public body, of such a privilege, and possesses no tenement, so as to enable him to prescribe for such an easement in his own name as owner of the tenement, and in right of his ancestors or those whose estate he has, he is reduced to claiming it as a customary right. Now, "a custom," says Lord Coke, "is local, and claims to override the principles of the Common Law only in particular places." If, therefore, a custom be laid for all the people of this realm, or for all the persons passing through this village, to use a certain piece of land, the custom is bad, as it passes its local limits, and assumes to be the Common Law of the realm. "For the Common Law is nothing more than a custom that extends over the whole land." A right to the enjoyment of land can, then, only be claimed at all for the inhabitants of a particular place, and it seems doubtful whether it can be justified by the Common Law, so as to extend the benefit of it to the whole of society. Under these circumstances, it seems difficult to see what justification could, strictly speaking, be pleaded to an action of trespass, brought by the owner of the soil against a stranger to the place, even though the inhabitants of the adjoining parishes might have a right to the enjoyment of the land in question. This seems to be more especially the case because, if such right be taken to exist, it seems difficult to reconcile it to the next principle which we find laid down.

This is similar to one to which allusion has before been made in treating of the rights of commoners over the waste, *viz.* that "if a man claim by prescription any manner of common in another's land, and that the owner of the land shall be excluded from having pasture, estovers, or the like, this is a prescription or custom against the law, to exclude the owner of the

But only the inhabitants of the place can make a claim by custom.

In general no easement allowed, that is so extensive as to deprive the owner of the soil of the benefits of ownership.

soil.<sup>1</sup> In like manner, if any right be claimed of so extensive a nature, that the owner of the soil is excluded from the profits arising from the land, it is inconsistent with the rights of property ; for no man can be considered to have a right of property worth holding in a soil, over which the whole world has the privilege to walk and disport itself at pleasure.<sup>m</sup> We believe, then, that though a custom may be upheld for the inhabitants of a place to make use of a piece of ground for sports or for exercise, such a claim put forward on behalf of all the world would, as the law now stands, be untenable. Were it not so, it is easy to see that the right might be exercised to such an extent that all the produce which the land was best calculated to yield might be destroyed, and the owner might be prevented from enjoying it to those ends, to which alone it could be beneficially applied. It seems at first sight difficult to reconcile this principle with the rule laid down in *Fitch v. Rawlings*, and *Abbott v. Weekly*. The law, however, comes to our aid, and by creating a fanciful distinction between village greens and commons removes all difficulty.

It is in general a tolerably simple matter to distinguish between a green and a common ; but it is difficult to draw the precise line between the two, and difficult to say what right the public can have acquired to the one, that they have not gained over the other. The right of the public to use village greens for exercise and recreation is as jealously regarded by the law, as their right over commons is ignored. In the one case, an original dedication to the public is presumed ; in the other, it is not. Thus it is laid down that "undoubtedly where there exists a piece of ground, dedicated from time immemorial to the public, from which a custom may be laid for sports generally or for village recreations, no one will suppose that such rights can be affected by"<sup>n</sup> a decision that denies the right of the public to wander at will over the land adjacent to a footpath, where they have from time immemorial been accustomed to take their exercise.<sup>o</sup> "The rights to village

Distinction between greens and commons.

<sup>1</sup> Co. Litt. 122 a.

<sup>m</sup> Per Lord St. Leonards, in *Dyce v. Hay*, 1 Macq. 309.

<sup>n</sup> Ibid. 310.

<sup>o</sup> Ibid.



greens and playgrounds rests upon different grounds and is unassailable." Village greens are thus placed on a footing, different from that held by other lands, over which the public claim an easement. It is indeed hard to see the difference that is involved in this distinction. If a dedication be presumed in the one case, why not in the other? No doubt, in a country district, a large waste is subjected to a user very slight, in comparison with that exercised over an acre of uninclosed ground that happens to lie in the middle of a village. It is, in such a case, easy to say which is the waste and which is the village green. But where is the line to be drawn? If by a green be meant a place suited to and large enough for the requirements of the adjacent population for exercise, games, or the like, it follows that a green must vary in size, according to the number of the adjacent population. On this principle, it is easy in a country district to draw the distinction between the two; it is, however, difficult to see why, if an acre of ground adjacent to a village containing a thousand inhabitants be regarded as a green, places like Hampstead-heath or Blackheath, adjacent to a city containing millions of inhabitants, and subjected to a user so constant and so general that it must have afforded to the owner of the soil an indication that a right is claimed against him, should not also be regarded as greens, and be protected as such by the law. If a dedication—which is, after all, nothing better than a legal fiction—be presumed in the one case, why not in the other? In some cases (as in the case of Wandsworth Common), the part of the common adjacent to the village or town is regarded as a green from the fact of its having been subjected to so regular and constant an user. An original dedication is, then, it is to be presumed, supposed in the case of such a part. Why, then, should not this principle be applied to the whole of those commons which have been subjected by the inhabitants of the neighbourhood to a user as constant and as regular?

The law, however, by this arbitrary distinction, and by allowing the principle involved in the statute of Merton to be carried out to its full extent, denies the right of the public to make any use of open

Extent to which  
the right of the  
public is al-  
lowed.

spaces (with the exception of those which it regards as village greens, and in whose favour it presumes an original dedication), except in so far as the public has gained such right by custom or prescription. And as the public can but rarely subject lands to a user sufficiently constant, notorious, and regular (in the eye of the law) to form the basis of a prescriptive right, such right can be but rarely gained. Mere strolling or wandering is not regarded as a sufficient user to give a right by prescription. A right to ride or walk across the waste from one place to another may be gained, but such a right of way confers no right to walk over such parts of the waste, as must not necessarily be traversed in order to reach the particular destination. A right to play certain games, to dance, &c., may also be gained by custom; but the claim can only be maintained by the inhabitants of the adjacent place, and can be exercised by them, in some cases, only over a certain portion of the waste. In cases where the waste is very large in proportion to the surrounding population this last restriction seems reasonable enough. For, if the right to play games on a part of a large piece of ground conferred the right to play them all over that piece, the owner of the soil might be deprived of his power of planting, or in any way interfering with the nature of the soil of the whole of the land in question. He would, for instance, be unable to plant shrubs and trees in the place where cricket was played; for if the right to play cricket on a piece of land exist, the owner of the land has no right to do anything inconsistent with the exercise of that right. Consequently, if the public possess the right to play cricket over the whole of the waste, the lord would be restricted from interfering with the exercise of this right in any part. But, though the law enables the public to acquire these restricted rights, it has thus carefully fenced them round, and has not allowed them to accrue with any greater facility over waste than over cultivated ground, and recognises none as existing over the one that may not also be claimed over the other.

The rights allowed by the law to the public being thus scanty, the Legislature has made only a corresponding provision for them in the Inclosure Act of 1845.

Provision made  
by Act of 1845

That Act specially provides that none of the lands that are generally known by the name of village greens shall in any case be inclosed, so that the commissioners would be incompetent to entertain a proposal to inclose them; it moreover makes provision for the more effectual fencing and improving the surface of such greens.<sup>p</sup> It is also enacted that, in their provisional order concerning the inclosure of the waste lands of a manor, it shall be lawful for the commissioners to require, as one of the terms and conditions of such inclosure, the appropriation of an allotment for the purpose of exercise and recreation for the inhabitants of the neighbourhood, in proportion to the number of the inhabitants of the parish in which the ground in question is situated.<sup>q</sup> The power thus given was confessed by one of the Inclosure Commissioners, in his evidence before the Select Committee of 1865, to be very inadequate.<sup>r</sup> In the case of such land, power is also given to the commissioners to require, as a further condition of the inclosure, the appropriation of such an allotment for the labouring poor as shall seem necessary, such allotment, however, to be subject to a rent-charge, to be payable thereout to any person or persons who may be entitled to allotments under such inclosure.<sup>s</sup> Allusion has already been made to the powers given to the commissioners with regard to laying out roads and pathways, so that the bare rights of way which the public possess, as distinguished from the claim put forward to stroll and wander generally over the common, is not likely to be infringed upon.

These are the main features of the Act with reference to the rights of the public, which, though thus carefully restricted by the law, are large; and the claims of the public—which are much larger—to the enjoyment of wastes and commons for purposes of recreation and exercise. With respect to the rights (as recognised by law), the Legislature seems to have maintained them to their full extent by the special provisions of the Act. As to the wider moral claims, no special provision is made; but the Legislature

for the rights possessed by the public over waste lands.

The Legislature can deal with the claims (as distinguished from the rights) of the public according to the exigencies of any individual case brought before it by the Inclosure Commissioners.

<sup>p</sup> Sec. 15.    <sup>q</sup> Sec. 30.    <sup>r</sup> See evidence of W. G. Cooke, Esq.    <sup>s</sup> Sec. 31.

has reserved to itself an opportunity of taking them into consideration, by the general proviso that the consent of Parliament shall be a necessary preliminary to any action on the part of the Inclosure Commissioners. The Legislature has thus retained in its hands the power to veto any proposal that may be brought before it, if the proposed inclosure shall seem likely to prove injurious to the public interest.

Another Act has more recently been passed—the “Metropolitan Commons Act, 1866.”<sup>1</sup> This Act has reference solely to commons within fifteen miles of London, and provides that, with regard to such commons, the Inclosure Commissioners shall not be competent to entertain a proposal to inclose.<sup>2</sup> It further provides that a scheme may be brought forward by the local authority (meaning thereby, in some cases, the Metropolitan Board of Works, in others, the local board, in others, the vestry of the parish in which the common is situated) to provide for the drainage, levelling, and improvement of such commons.<sup>3</sup> The expenses thus incurred are to be paid out of the local rates.<sup>4</sup> The powers thus conferred upon the local authority, will, it is to be hoped, put an end to one great evil to which all, but most especially metropolitan, commons are subject. Any one who has visited Blackheath, Hampstead-heath, Wandsworth Common—or, indeed, any of the commons in the neighbourhood of London—must have been struck with the cruel manner in which the beauty of those places has been defaced by the wholesale digging of sand or gravel. Some parts of Wandsworth Common are so deeply excavated, that they are covered with water during a great part of the year, and in some cases the water is so deep and so little guarded against, that not only is the common completely disfigured, but it is absolutely dangerous to walk over it. Evidence was given before the Committee of the House of Commons in 1865 by Mr. Rose that he, with two of his neighbours, pulled a dead man out of one of the pits thus filled with water. The pit having been dug in the direction of a public footpath, the man had accidentally fallen in, and the water being so deep,

<sup>1</sup> 29 and 30 Vic. c. 122.

<sup>2</sup> Sec. 5.

<sup>3</sup> Sec. 6, *et seqq.*

<sup>4</sup> Sec. 26.

and the height of the bank from the water so great, he was drowned. Evidence was also given of the shameful disfigurement of other commons. That of Blackheath, in particular, has been completely ruined in one part, in order to produce the princely revenue of 56*l.* per annum. This Act, in order to insure, if possible, that the commons that are left to us shall not be totally ruined, provides that the scheme proposed by the local authority for the improvement and drainage of the common, may give compensation for any estate, interest, or right which it takes away or injuriously affects.\* It is to be hoped that the local authorities, by thus offering compensation to lords of manors, will induce them to give up the rights of digging gravel, &c., which, though of but small pecuniary importance to them, completely disfigure the appearance of the commons.

The Act, however, like the other Inclosure Acts, leaves untouched the powers vested in lords of manors by the statute of Merton; nor does it hinder the lord and commoners of any manor from extinguishing commons by mutual agreement, although greater danger, than formerly existed, seems to threaten our commons from these quarters, owing to the fact that the people, to whom rights of common belong, so frequently allow them to lapse. The Act, moreover, naturally does not interfere with the power of Parliament to pass special acts, authorising the inclosure of any open lands wherever situated. Commons, therefore, lie as much as ever at the mercy of the individuals to whom they belong, if it be wished to inclose them in one of these three ways. All that this Act of 1866 does for their protection, is to say that, for the future, no proposal to inclose them shall be brought before the Legislature through the medium of the Inclosure Commissioners. As, then, it seems probable that interested persons will still continue to apply to Parliament for special Acts to authorise them to inclose metropolitan commons; that applications will continue to be made to Parliament, through the Inclosure Commissioners, for its sanction to the inclosure of wastes situated near other large towns; and

What moral or equitable claim does the public possess over commons?

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\* Sec. 15.

as lords of manors will continue to exercise, unless checked, the powers vested in them by the statute of Merton, in all cases where the rights of the commoners have dwindled away, so as to enable them to approve, it seems necessary to consider, what claim, apart from strict legal considerations, the public possess over commons, and what weight ought in justice to be attached to these claims by the Legislature before entertaining any proposal for inclosure. Reasons have been already stated, which show it to be of paramount importance, that these claims of the public should be rigorously upheld. Parliament has, in some cases, reserved to itself an opportunity for taking these claims into consideration; it is its duty to reserve to itself such a power in every case. Nor can it be a violation of justice, or an interference with the rights of property, to do so in the one case more than in the other.

In weighing the moral claims of the public against the rights given by the law to the lords, what are we to take as the standard whereby to judge them? Are we to consider that the law is all-wise and all-seeing—or can we not in justice take into consideration the general opinions and necessities of mankind, and allow to them some weight as against the consequences of a theory, which, as we contend, was formed by the law upon altogether erroneous considerations, and which has but just lately come into collision with the sentiments and wants of society? Are we to recognise as incontrovertible facts all the doctrines that the law lays down—or are we not justified in appealing to the general sentiments of mankind to show upon how false a foundation those doctrines rest? Are we, in short, bound to allow full force to the legal theory that gives such ample rights to the lords—or are we not justified in appealing to another standard to show that those rights do not exist in reality, and have never been allowed by society to the extent sanctioned by the law? It must also be remembered, that these moral claims of the public are of greater antiquity than the legal rights of the lords, and have, moreover, been freely acted upon by the public from time immemorial, whereas the rights of the lords have existed theoretically in the contemplation of law, and have, until lately, only been put into practice where no evil was foreseen, but

Conflict on this  
point between  
law and public  
opinion.

rather a great public good contemplated. And thus it has been only in comparatively recent times, that the two have come into competition with each other.

We must protest that we do not wish for one moment to impugn the sanctity of those laws of property which rest upon a firm foundation as being sanctioned by the universal consent of mankind. Where the law coincides with the general sentiments and ideas of society it is, without doubt, unassailable. No one would attack the law, that gives to a man the property in a chattel, that he has acquired by his own industry and talent; or in those lands, which those persons, in whose rights he claims a property in them, ages ago cleared and brought into cultivation; but there is obviously a distinction to be drawn between a law that finds so strong a sanction in public opinion, and a law that is totally at variance with both the opinions and the requirements of society. Nor are the sentiments of mankind so variable in these respects, as popular opinions are generally wont to be. On the contrary, they were found to be so uniform that the Roman law regarded the main principles of the law of property, which they found held good amongst all nations, and which were based upon the common sentiments of them all, as principles of the law of nature, and this on account of their exact uniformity. In rude societies, undoubtedly, laws of property are loose and inexact; but, as a society advances in civilization, its fundamental laws of property have a constant tendency to a uniformity with those of other societies existing under circumstances similar to their own. Thus the Scythians are said to have had no law whatever of property in land; but, if their numbers had greatly increased while the territory available for them became circumscribed, a law of property in land would have sprung up amongst them, similar, in its main principles, to that established among other nations surrounded by the same circumstances as themselves. So far, then, as the law of property in land or in anything else is sanctioned by the sentiments and is agreeable to the requirements of society, so far would we recognise its existence. But as laws are modified in accordance with the exigencies of social necessities and social opinion, and as social opinions are not (except in so far as the

Distinction to be made between laws sanctioned by and laws opposed to public opinion.

law exerts upon them a great conservative power) moulded in accordance with any legal doctrines, we regard the general opinion of mankind as of higher importance than the *ipse dixit* of the law.

If, then, we take social opinion as a standard higher than the law, and to the level of which law has a perpetual tendency to rise, we may assert that, though the law regards every acre of ground in the kingdom as the property of somebody, and as all alike the sole and absolute property of its owner, there are, practically, various gradations of property in land.

If we take the case of a piece of ground on which a house is built, and another piece which has never been inclosed, and on which the hand of man has never been exerted, can it be said that there exists the same degree of absolute ownership in the one case that there is in the other? The sentiment of mankind readily acknowledges the force of the well-known maxim, that "every man's house is his castle;" but does it equally sanction the existence of an absolute ownership in open and uncultivated wastes? Between the piece of ground, on which a house stands, and the common, there are various gradations; there are the garden, the pleasure-grounds, the fenced and cultivated fields. The law says, that a man has no more right to walk in a stubble-field which belongs to another, than in a gentleman's flower-garden, but is this principle sanctioned by the general feelings of society? and is there not a further distinction between the stubble-field and the common? The law that says, that a landowner shall have the sole enjoyment of the land he tills and the house he occupies, has, doubtless, the sanction of social opinion; and the same may be said of the law, that allows only the lord of the manor and the commoners to have the right of pasture &c. upon a common; but, so far from its sanctioning the law that makes it a trespass for a man to ride or walk over a piece of waste ground, it is very much to be doubted, whether ninety-nine people out of a hundred are not ignorant of its existence.

Granted then, that, according to this standard, these distinctions and gradations of property in land exist, the question now arises how far a landowner has or

Taking the common sentiments of mankind as a standard, there are practically various gradations of property.

How far is society to allow



ought to have a right to raise a portion of his property in this graduated scale; to convert his arable land into and give it the greater degree of privacy belonging to a pleasure-ground, and, in like manner, to raise his uninclosed waste to the degree of inclosed and cultivated ground. In general, we allow a landowner a power over his property, which is practically absolute; we allow him to build houses upon his fields; we leave to his discretion the sole management of the cultivation of his ground. The law is, that a man may do as he likes with his own ground, provided he does so without injury to the land of his neighbour—"sic utere tuo, ut alienum non lædas." But a consideration of the subject leads us to the opinion, that we may continue to leave to the landowner this general power, inasmuch as his interest is concerned in not abusing it, but that society is not bound to practically concede to him such absolute power as is theoretically given by our law, without any inquiry as to whether such power is to be used for the benefit or to the prejudice of society, or whether the exercise of such power will be in accordance with the common sentiments of mankind.

a man to raise his property in this graduated scale? As far as society has security that he will not abuse the privilege.

In most cases the interests of the landowner and those of the public coincide. Society allows the landowner to have an action against any one trespassing on his land, because it is seen that it is impossible for him to produce food for us if the whole world is at liberty to tread down his crops. We make no law compelling the landowner to cultivate his fields, because we are sure that he will make them as productive as he can; for, if he neglect to do so, he will be the greatest loser. We make no law compelling him to let land for building purposes where it is required, because it is so much more profitable to him to let his land for building, where houses are much in request, that we are sure that regard for his own interest will in general lead him to do so. This principle lies at the bottom of the theory that makes our law regard a landowner as having absolute power over his land; and it is in this principle of the identity of interest between the landowner and the public that we must look for the reason that we have hitherto felt no ill effects of

Society has no such security in the case of inclosures.

this absolute ownership. But, if we take the case of the inclosure of a common situated near a large town, in which it is for the interest of the landowner to have it inclosed, and the interest of the public that it should remain as it is, the case is altogether different. In the one instance, the public possesses good security that the power which it allows the landowner will be exercised to its advantage; in the other, it has the same security, that it will be used to its detriment. In the one case, just so much land is appropriated for building, so much for growing wheat, so much for barley, and so forth, as is required by the public; for this reason, that it is the interest of the landowner to do so. In the other case, land would be inclosed, if unlimited license to inclose were granted, just where the interest of the public most required that it should be waste and open; for the same reason, because there it would be most to the interest of the landlord to inclose. Because, then, we allow the landowner absolute power over his land in cases where it is not only consistent with but absolutely conducive to the interest of the public, is this to be taken as a reason for our granting him this power in cases where his interest is at variance with that of society? or are we to take it as evidence of his possessing this power over one kind of land as completely as over another?

It may, perhaps, be said, if there be this conflict between the claims of the public to the use of commons for recreation, and the rights of the lords to the sole property in the soil, how is it that they have not come into collision before? and how is it that for centuries the law has, in opposition to the interests of society, maintained that right? The reason is, that it has been only in recent times that the conflict between the two has been much felt. Even now it is, in rural districts, comparatively unfelt. But take the case of London, for example. Many people now living remember Bayswater a country village, quite apart from London; and many of the suburbs of London, which are now completely incorporated with the great city, were, fifty years ago, rural districts. The importance, then, of places like Hampstead Heath and Clapham Common to the Metropolis is much more strongly

Reasons why  
the conflicting  
nature of rights  
of public and  
those of lords of  
manors over  
wastes has not  
been perceived  
before.

felt now than it was fifty years ago; and it seems probable that, fifty years hence, the importance of such places will be still further enhanced.

We see then, that, under a comparatively new set of circumstances, the reasons, which have hitherto existed for allowing the lord of the manor to acquire an absolute ownership in the waste, no longer apply, nor do the principles, upon which we allow private property to be recognised in land, force us to continue to the lord of the manor the privileges, which society has hitherto allowed him to enjoy. It must at once strike every one, that property in land is of a more or less qualified nature, and differs from the property in personal chattels. The latter are products of man's ingenuity, industry, and skill, and are universally recognised as the sole property of him by whose hands they were made. Land, on the contrary, is the gift of God to man; and, except in so far as it has been improved by the hand of man, seems the natural inheritance of mankind rather than the property of individuals. Articles of manufacture are unlimited in extent; land is very limited. It cannot but be acknowledged, then, that the title to land is a very different matter from a title to articles of manufacture, and we are led to regard it as a trust conferred by society upon the landowner for the general good, rather than as his absolute property to deal with for his own exclusive benefit, without any regard to the interests of society at large.

We regard property in land, then, in this light, and have stated the reasons why society has in general allowed it to be absolute and unqualified, and have shown how these reasons do not apply to give a landlord power to exercise his rights when they come to be at variance with the interests of society. Society continues to allow to landowners a practically unlimited power over their land, because it has good security that this power will be employed for its benefit. That this is the reason why society grants the power in question will be evident, if we consider a case in which landowners neglect the interests of the public. Land being very limited in extent, the landowners have practically a monopoly of it. Supposing

Property in land  
a trust.

Landowners  
ought not there-  
fore to be al-  
lowed to use  
the privilege  
conceded to  
them to the pre-  
judice of society.

that food could not be procured from other countries, and that we had all to depend for our sustenance upon the food produced from our own soil, is it reasonable to suppose that, if, in such a case, our landowners, neglecting their own interest, combined together in a determination to cease to cultivate their land, the Legislature would recognise their right of private property and of absolute ownership, and their utter exclusion of the claims of the public to have an interest in the land, so far as to allow them to let it lie idle and unproductive? And, in like manner, in the case of landowners, who own wastes in the neighbourhood of large towns, and so have a complete monopoly of the land available for the exercise and recreation of the inhabitants, which are of such overwhelming importance to the moral and physical welfare of the public, if they wish to inclose them, and so place them in a condition, in which the public would be robbed of the advantages which they at present enjoy from them, is not the Legislature equally justified in interfering to prevent it, and in saying to the lords of manors 'We recognise your claims to continue to enjoy the whole of the natural produce of this land, but we will maintain the right of the public to continue to enjoy it for their exercise and recreation as they hitherto have done?'

Again, if we examine the grounds, upon which property in land is suffered by society to exist, we shall see that they cannot be made a reason for allowing lords of manors to appropriate to themselves the sole enjoyment of an uninclosed waste. When we consider the tardy return made by the earth to agricultural labours, we shall easily understand how, amongst a rude nation, customs became established, that allowed the man who sowed a piece of ground to remain the sole owner of that ground until he had reaped the produce. Indeed, but for the existence of some such law or custom, nobody would be found to till the earth at all. A similar advantage would among a rather more civilized society be conferred upon him who planted a tree, the fruits of which would reward him for his labour at some distant period. In process of time, when open ground fit for cultivation became scarce, some members of the rude society would, in the confidence that they would be allowed to reap the sole benefit

Origin of property in land.

of their labour, set to work to subdue forests, subject bogs to some sort of drainage, or erect dams to prevent a river from periodically overflowing a piece of territory. The ground so reclaimed they would forthwith claim to appropriate. It must have been on some such grounds as these that among rude societies the idea of the appropriation of land first originated. The conception at length becomes familiar; until in time, when the society has increased in numbers, nearly all the most convenient and fertile spots have felt the influence of the hand of man, and have become recognised as the property of him who has reclaimed them from their original wildness. The benefit of the labour of the original cultivator is allowed, at length, to be enjoyed either by his family at his death, or by any one who has managed to possess himself of the land, and who, having maintained himself there for a certain time, and having possibly further improved the soil, is, by the force of the idea that has become prevalent, that all improved land is the property of somebody, in time regarded as the owner.

This meritorious ground for appropriating land in right of the person who originally reclaimed it, is undoubtedly at the bottom of all our ideas of the sole right to land vesting in some favoured individual; and when the idea once became familiar, it came by degrees, and by force of the notion that everything ought to have an owner, to apply to all the land belonging to the society, although the idea still continued to exist that the ultimate property in the soil always remained in the nation or tribe. It was thus that, in our own country, even all the feudal sub-tenants had to do homage to the king as their feudal lord; thus recognising in him, as the trustee or representative of the State, the ultimate owner of the land. But though, upon this idea of individual ownership becoming prevalent, it was extended even to those lands which had not been reclaimed, it must certainly be confessed, that the grounds that exist for individual appropriation in the one case, do not apply to the other, and that the reasons which justify the appropriation of unreclaimed lands, are infinitely weaker than those upon which individual ownership is based, in those lands that have been cultivated. It may then be said,

Right of the landowner to an exclusive enjoyment of the waste lands arose in analogy to that allowed in the case of cultivated grounds.

that society has, for the encouragement of agriculture, abdicated in great measure its rights to those lands which it has suffered to be reclaimed; but it must necessarily retain many of its original rights with regard to those lands which lie in great measure still in their primitive wildness; and, as society must originally have had the right and power to determine whether it would suffer lands belonging to it to be cultivated and appropriated by its members, so it must still retain the right to maintain the great interest it has not yet parted with in those lands which have not been reclaimed, and over which it has not released its hold in the same degree that it has in the case of those lands which it has suffered to be appropriated and cultivated by individuals. And, as society, for wise motives, recognises individual ownership in all those lands that it has suffered to be reclaimed, and has extended in consequence a fuller right of ownership to those lands than it has to others, it ought certainly to reserve to itself power to say, whether it will permit further reclamation to be made, and so extend to other lands those privileges, which it has wisely allowed to attach themselves to lands that have been reclaimed.

If it be true, that the gradations of property in land exist as matters of fact (even though not recognised by law), and that a less complete ownership really exists in some lands than in others; it follows, that society at large must possess just so much property in the land that is the subject of a less complete ownership, as this less complete ownership is in want of, in order to raise itself to the most absolute and unqualified ownership that can be conceived. For everything upon the earth is equally the subject of complete ownership. A pearl brought from the depths of the sea belongs absolutely and completely, by the law of all nations and in accordance with the common sentiments of mankind, to the diver who found it; but, before it was found, it belonged as absolutely and as completely to mankind in general. In like manner, the land of a country belongs to the society that has discovered and appropriated it. Before it was so appropriated, it belonged to mankind in general. Society then originally and ultimately enjoyed a complete and absolute ownership over the land it

The smaller the property vesting in the land-owner, the larger the property remaining in society at large.

had appropriated. Over one part it allowed individuals to usurp a certain proportion of this ownership, over another part a certain larger proportion. But, as its own ownership was originally absolute and unqualified, it necessarily retained in its own hands just so much property in all land as it did not suffer to be acquired by individuals. So that, if it be true, that there exists in landowners a less complete property in waste and unclosed lands than in lands that are cultivated or built over, the property retained by society in its own hands is necessarily greater in the one case than in the other.

It is laid down by our law, that the public have in general not gained a right by prescription or custom to take their exercise or recreation even in those places, which they have nevertheless subjected to a pretty constant user. The reason of this is, that the user is not recognised in these particular cases as of a nature to form the basis of a prescriptive or customary right. But does not the very use of the word "gain" in such a case argue a total confusion as to the origin of property in land? Does it not seem to imply that the individual proprietor, and not society at large, was the original owner? Over a piece of ground, with which society has long ago abdicated its right to meddle, it may indeed be said that we have rights to gain, or perhaps more correctly to regain; but this is evidently not the correct term to use, when the question is, whether society shall still continue to exercise acts of ownership over a piece of land, its rights in respect of which, as it has always exercised them, it cannot be taken to have abandoned. If then it be, on the one hand, contended that the public ought not to be allowed to retain the right that it has always exercised, of enjoying a piece of land for its amusements, we answer, that the landowner has never gained the same right to exclusive ownership in such a piece of land, that he has gained in those lands which society has suffered him to inclose and cultivate; and that the continuous user on the part of the public is a proof that he has not. To suppose otherwise is to confound the whole idea of property in land—to imagine that the individual landowner, and not society at large, was its original owner.

Society and not  
the landowner  
the original  
owner of the  
land.

It is on these principles, that the right of the Legislature may be justified, to reserve to itself the power of regulating inclosures which it has hitherto claimed for itself, and upon which it appears to be just that Parliament should, for the future, be very chary of allowing lords of manors to usurp rights which society has really never parted with. It has only been in comparatively recent times, that, on the one hand, the eagerness to make inclosures in consequence of the increasing value of land, arose; and, on the other hand, the necessity of retaining open spaces of ground, in consequence of our increasing population, became apparent. Under one set of circumstances, society has favoured inclosures; under totally different circumstances, it must now discourage them and put every obstacle in their way. Every Inclosure Act, from the statute of Merton downwards, has been a renunciation by society of the rights it originally possessed. Under a legislature composed of lords of manors, it has become the law that when society renounces its rights it should give the lion's share of them to the lord of the manor. Whether this rule continues to exist or not, is not to our present purpose; but we maintain that society ought not to make any more renunciations in favour of any one. The statute of Merton contained a license from society to the feudal lord of a district, to reclaim more land from its state of nature, and turn his very qualified and undefined claims over it into the greater degree of ownership that society allows to inclosed and cultivated ground. Society had already parted with a certain amount of its interest in the land; this statute contained a renunciation of a still greater proportion of its originally absolute ownership to lords of manors. But when the necessity for regulating further inclosures became apparent, it was at once felt by the Legislature, that society retained many of its original rights over the uninclosed waste land. With land in which a higher degree of property exists, the Legislature has hitherto been (and justly so) extremely shy of meddling. But it has always felt itself at liberty to make regulations with regard to commons, inasmuch as it has always been felt that they were not to the same extent the subjects of private property. And though, for the sake of

Every license to inclose is a renunciation by society of its rights.



agricultural improvements, to open large fields for remunerative investment, and to afford increased opportunities for labour, it has hitherto wisely facilitated the inclosure of, and has so far abandoned its own rights to, wastes; yet it has shown a wise jealousy in guarding the rights, which society retains in those lands over which it has not abandoned them, in those cases where the interests of society imperatively assert, that they are not to be abandoned.

The Legislature has then a good right to interfere for the public good in cases where proposals for further inclosures are made, against any encroachments on the part of those who, though recognised by the law as the absolute owners of the land, possess in reality, according to the standard we have taken, but a qualified and partial ownership in it. And thus it cannot be said that the Legislature, in taking this course, interferes with the rights of private property. It merely says, that in certain cases the State refuses to resign a larger degree of ownership than it has hitherto parted with. It is a different thing altogether from attempting to meddle with those rights that it has already abdicated. It may be said, that if the good of society be taken as the end to which all legislature should tend, the State would confiscate all private property in land, and become the universal landlord; that the rents that would thus accrue to the State would relieve the community from the burden of taxation, and so a great public good would be conferred. This is to a certain extent true; but justice, which is always synonymous with the true and permanent interests of society, puts its veto on such a proposal. Society then cannot seek to recover rights, which it has long ago abdicated, but it is undoubtedly justified in preventing individuals from acquiring any further right at its expense; and for society to say "we will not sanction this inclosure," is merely equivalent to its saying "we do not wish to interfere with the rights over this land that we have allowed you to appropriate, but we are not disposed at present to resign to you any of the rights over it, which we have never parted with, and which consequently have never vested in you."

For the State to prohibit an inclosure is no interference with the rights of private property.

It has, we believe, been contended, that if the Legislature, for the sake of the good of society, refuse to allow the lord of the manor to inclose his commons, some compensation ought to be given him for the loss he sustains, or rather, in lieu of the benefit he is precluded from gaining. "The Legislature," it is said, "in passing a Railway Bill interferes, for the public good, very materially with the rights of private property ; but in this case ample compensation is given to the landowner for his surrender of the rights he possesses. If in this case he receives compensation, why should he not in the other?" If, however, the principles we have laid down be correct, the fallacy in making this demand, lies in not distinguishing between an actual sacrifice of an existing right for the good of society, and the mere non-acquirement of an additional right to the detriment of society. The reasons then for allowing compensation in the one case cannot at all affect the other ; nor ought the lord of the manor ever to be allowed any compensation for that part of a waste which he gives up for any public undertaking, beyond what is sufficient to compensate him for the actual, as distinguished from the prospective, loss he thereby incurs.

Much of what has thus been said with regard to the right which the public ought to have to make use of commons for their recreation and exercise, applies, though to a less extent, to all other land. Though the law gives to a landowner the right to exclude every member of the public from his land, and the sole privilege of cultivating and reaping the fruits of it, and of spending his labour and industry upon it in any way he chooses, yet social opinion seems here again to come to our aid, and, recognising different grades of ownership in land, to assert our common right to the enjoyment of all land for those purposes, so long as no injury is done or is likely to be done to that part of it which is the produce of the owner's toil, and so long as no violence is done to the owner's privacy in those parts which he has set out and appropriated for his own private pleasure. If we regard the land of a country as the common inheritance of the inhabitants of that

Nor have lords of manors, to whom a license to inclose is refused, any claim to compensation.

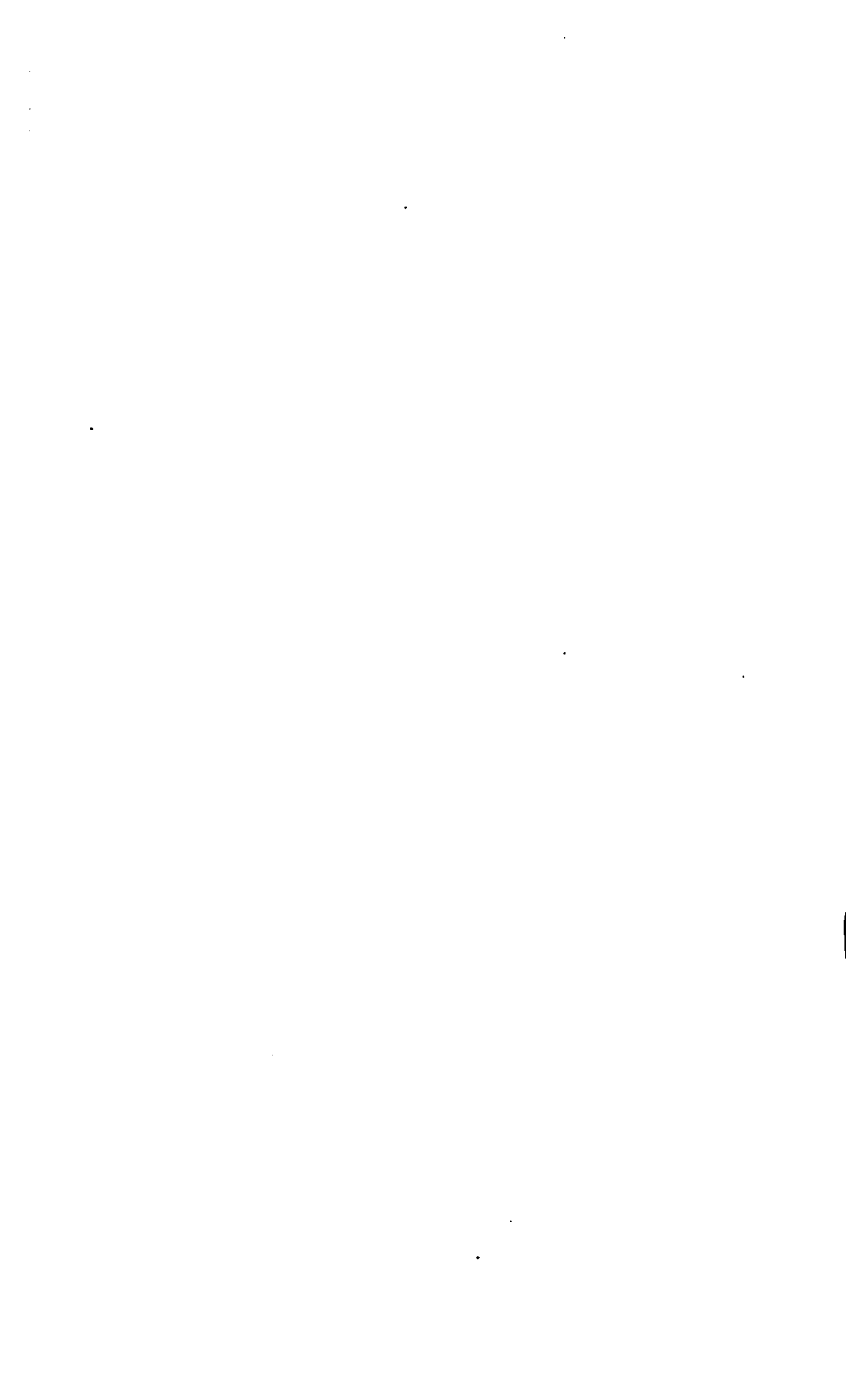
Rights of the public over other lands.

country, it seems that for a landowner to be allowed any extensive right at all over a portion of the common inheritance, while there are others who have no portion, is already a privilege. The origin of the privilege was, that the person, to whom it is entrusted, might be encouraged to spend his labour and industry in order to raise from his portion food for the common benefit. Hence arose the doctrine of our law, that ascribes the sole property in a piece of land to the owner of it. This doctrine at first did no injury to the public, as, when the population was sparse, every man had, practically, ample grounds for his recreation and exercise. It was, consequently, allowed to its full extent; nor could the Legislature foresee the dangerous consequences it might, when the country should be more densely populated, entail upon society. But society having allowed land to be appropriated with an ultimate view to the common good, and not having suffered any portion to become the subject of entire and absolute property, but having always retained some kind of interest (in some cases greater than in others) in the whole of it, it would seem that no exclusive privilege should be permitted in any individual that cannot be shown to be productive of positive good. Practically speaking, the time has not yet come when the evils of the law that enables one man to exclude all mankind from his land are much felt. As a general rule, landowners do not object to persons trespassing upon their land at times when no injury is done, and in a manner that is not likely to become the basis of a prescriptive right, and that does not interfere with their privacy. Were they to do so to such an extent that the inconvenience was generally felt, they would find public opinion against them; and it is probable that the rule of law which puts it in their power to do so would be modified in accordance with the exigencies of social necessity and social opinion. The title of landowners to possess the sole right to the land on which stand their houses, or which is converted to their pleasure-grounds, even to the utter exclusion of every other person, finds a firm basis in public opinion, and is in no danger of being assailed. Their title, also, to possess the sole right to cultivate and to reap the sole benefit of their land which is already reduced to culti-

vation, to the exclusion of every one else, is just as thoroughly recognised ; but with this right, the right of the public to walk in moderate numbers over the land, in such a way that they do no damage and are not likely to do anything inconsistent with the purposes for which the ground is kept, has just as good a foundation, both in justice and expediency, and ought as strenuously to be maintained.

In conclusion, then, we would say, that as the lord of the manor possesses, in virtue of the ownership, which, as between him and the commoners, and as between him and any individual, is vested in him, power to veto any proposal that may be made to inclose the waste of his manor ; so, in virtue of the high and paramount claim which society has never abandoned, to possess a large proportion of property in those lands which it has not yet suffered to be brought into cultivation, would we reserve to the Legislature, as being the representative and trustee of society, power in every case in which the public interest demands it, to veto absolutely any proposal for inclosure that may be brought before it. As, on the one hand, this power is preserved to the lord for the protection of those rights which the law considers that he has never allowed to issue from himself or to be encroached upon by others,—so, on the other hand, ought a similar power to be preserved to the State for the protection of those rights which it has never abdicated, and which the lords have never more than in theory possessed. And it must be remembered that this must be done now or never. It will be too late, when the inclosure is once made, for society then to reassert its rights, and so do a violent prejudice to the rights of private property, which it has once permitted to accrue. In rural districts, the matter is of comparatively secondary importance. But in the neighbourhood of our large towns, where the country hedge is perpetually giving way to the brick wall,—where houses take the place of trees, and thickly-populated terraces the place of cornfields,—and where the plough and the sickle are perpetually receding before the advance of the steam-works and the factory, prompt and energetic action seems to be required to preserve, in their natural condition, those heaths

and commons that still remain, and that give a guarantee, that we shall have some ground left for the prosecution of athletic and manly sports,—and some refuge from the din and smoke of our ever-increasing towns, where we may breathe an air uncorrupted and pure, and enjoy the quiet and the beauty of the country. We may cover an indefinite quantity of our land with stately buildings, we may employ every available corner for the production of food, and pride ourselves on the material wealth we have acquired, but we should provide better for our own comfort and happiness by leaving some portions of our country in their primitive wildness and luxuriant beauty, and by leaving to Nature some opportunity of displaying her uncultivated charms.



V.

ESSAY

ON THE

PRESERVATION OF COMMONS

IN THE

NEIGHBOURHOOD OF THE METROPOLIS

AND LARGE TOWNS.

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"Common benefits are to be communicate with all."

BACON'S ESSAYS.

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By ROBERT HUNTER,

OF UNIVERSITY COLLEGE, LONDON, MASTER OF ARTS OF THE UNIVERSITY OF LONDON.





## ESSAY V.

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“THE constitution of England was not made, but has grown,” is a boast that has frequently been uttered. Whether the state of things thus lauded is altogether one for congratulation may be doubted, but its existence cannot be denied. The rights and privileges, the duties and relations, of Englishmen have never been stated in one document or set of documents, drawn up at a definite time and place. They have never been summed up and arranged in a methodical manner, embodied in fixed principles and rules, and consolidated into one harmonious system. On the contrary, they are set forth partly in written, partly in unwritten laws; they are regulated in one respect by a statute of yesterday, in another by a tradition hundreds of years old; general principles conflict with particular cases in their determination, and the history of past centuries must be studied to explain the usages of everyday life.

One branch of our law is pre-eminently distinguished for its dependence upon antiquity. The law of property in land, though in many cases declared by modern statute, is yet perfectly incomprehensible without reference to the constitution of society in the middle ages. The manner in which land is held, the different sorts of estates that may be acquired in it, and the means by which it may be passed or conveyed from one person to another, are all without meaning, until we trace their origin in that institution which played so important a part in remodeling European society—the feudal system.

To the principles which animated, and the usages which obtained in, this system, we must look for an explanation of those complicated relations between man and man which are connected with the proprietorship of the soil, relations which subsist now sometimes in little more than the name, sometimes in an entirely changed form. Amongst these relations, perhaps

none stands more in need of explanation, by the aid of historical research, than that which subsists between lords of manors and their fellow-subjects. The name is one that is still in frequent use. Every now and then it is discovered that there is a definite person behind the name. Some one wishes to enfranchise a copyhold, and finds to his cost that certain fines have to be paid to this person. Or a strip of a common is inclosed, and it is by the supposed authority of this person that the public are shut out. Nevertheless, who the lord of the manor really is, what are his powers and his duties, if he has any, and how he attained to the somewhat peculiar position which he appears to occupy, are questions which perplex many, and to which the majority of Englishmen could give no satisfactory reply.

The feudal system, with which, as we shall soon see, manors are essentially connected, seems to have grown up spontaneously, but gradually, in all the countries on the continent of Western Europe about the same time. It originated in the practice of granting to the followers of great chiefs, called by Tacitus *comites*, and afterwards *fideles*, *leudes*, or *antrustiones*, large tracts of land out of the Crown estates, not, as in the case of the bulk of the soldiers, to hold as their absolute property, but only for life, and as long as they continued faithful to their chief, or, according to other authorities, simply at the pleasure of the donor.

Whether these *antrustiones* at first undertook to support their leader or lord in all his wars, and attend in his courts, seems uncertain; but there is no doubt that a personal bond of fidelity was entered into by them, which would necessarily comprise, in those troublous times, the duty of supporting their lord in defensive wars at least. The grants of land thus made were called *beneficia*, as being gratuitous donations, and *honores*, as being marks of distinction, and before long obtained the additional name of fiefs or feuds.

There is no doubt that some time elapsed before any hereditary property was acquired in these *beneficia*. They were a recognition of the personal worth of the donee, to be held by certain personal services, which it might be out of the power of his descendants to render. Gradually, however, the natural change which allowed the son to step into his father's place was

brought about, and by the end of the eleventh century the hereditary nature of fiefs seems to have been universally recognised in the feudal kingdoms. The next step, and one which immediately followed, was the acquisition of the right of sub-infeudation. The vassals, imitating their kings or superior lords, began to carve out portions of their feuds and give them to others, to be holden of them by the same kind of services by which they themselves held. It was not until the practice of sub-infeudation was introduced that the feudal system could be said to have arrived at maturity. It was this practice that brought into such strong prominence the personal nature of the feudal bond as distinguished from the bond which unites the citizen to his state, the subject to his king. For under the true feudal system, the vassal having sworn fealty and done homage to his immediate lord, was bound to follow him in war, even against his superior, and this was actually done in the case of the English subjects of our early Norman kings, who were vassals of the French monarchs. It is very important for the purpose of the present Essay to notice the strong nature of this personal tie between lord and vassal, and we shall have occasion to refer to it again in determining the duties of a manorial lord to his tenants.

The feudal system, then, in its mature form may be described as a system in which lands were held of the king (either immediately or mediately through several fellow-subjects called *mesne lords*), not as king, but as lord paramount. The conditions on which lands were so held were, that the tenant should do homage to his lord, professing that he did "become his man, and would bear him faith of life and limb, of body and chattels, and of every earthly honour, against all who could live or die;" that he should swear to him an oath of fealty, the words of which were not very different to those of the homage; that he should serve with him for a certain period with his vassals and attendants in the field when called upon to do so, and do all else included in the professions of homage and fealty; that he should be bound to pay to his lord aids, reliefs (*i.e.* fines on succession of the heir), and fines on alienation; and that the estate should return to the lord or donor, either by escheat when the tenant died leaving no heir capable of succeeding on the terms

of the original grant, or by forfeiture when he committed some breach of his engagements to his lord.

Such, then, was the nature of the genuine feud when thoroughly determined. But as a part of, though an innovation upon, the same system, there grew up tenancies which obtained the name of improper feuds. There were several varieties of these, but the most important was that which arose between great lords and the small tenants who held their lands not upon military or free, but upon what were called base, services.

These tenants were not obliged to follow their lord to the field, but were bound by their oath of fealty to plough his lands or to pay him a certain rent in corn, cattle, or money.

That such a class must inevitably spring up as soon as society became stationary and it was necessary to recur to the same fields for food year after year needs little proof. But the mention of them naturally leads us to speak of what may be called the domestic economy of the feudal system, a description of which will be little else than a description of manors.

The barbarian conquerors of Western Europe, like their civilised Roman opponents, depended for subsistence in the first instance upon the labour of slaves. Large numbers of the conquered inhabitants were compelled to till the fields for their new masters, to wait upon them, and to exercise what little knowledge was then possessed of mechanical arts. The feudal lord, then, upon entering into his feud, would find a large body of slaves, or, as they were called when their condition became slightly ameliorated, villeins (*villani*), who were usually *adscripti glebæ* or *villæ* (whence their name), *i.e.* attached to the soil, and bound to cultivate it for the lord's benefit, reserving little or nothing for themselves.

These villeins were of two kinds,\* those who were incapable of acquiring property at all and were wholly in the mercy of their lord, and those who, though bound to the soil, were only liable to make fixed payments and perform certain services, and were protected in life and limb, though at their death all they had escheated to their lord. The former kind were, it seems, generally called serfs, to distinguish them from the latter, who were

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\* Hallam, 'Middle Ages,' vol. i. c. 2, pt. ii. p. 198, 10th edit.

the villeins proper.<sup>b</sup> But whatever the value and importance of this distinction, both classes of villeins were alike employed to till the lord's lands, and on their labour alone in the early days of feuds he no doubt subsisted. But finding, probably, after a while the exhaustive and unprofitable character of slave-labour, the lord began to let out portions of his lands to be cultivated, either by serfs or villeins whom he had manumitted, or, as is supposed by Robertson, by the owners of neighbouring allodial lands,<sup>c</sup> or, as seems not improbable, by such of his fellow-countrymen, members of the conquering race, as, by the vicissitudes of fortune, were reduced too low to hold lands by knight's service, and yet not so low as to plunge them into slavery. There was also another way in which these tenants by base services were constituted. Small allodial proprietors, who had nominally all the rights of freemen, found themselves oppressed by their great neighbours, and liable at any time to be swallowed up by some more than usually rapacious and unscrupulous baron. In order that it might be some one's interest and duty to protect them, they accordingly acknowledged themselves to be vassals of a baron or knight, doing homage and fealty to him, and engaging to perform such customary services to him as might be fixed upon. These services would sometimes be of a military nature, but more frequently, in the case of small proprietors, of a base character, and as time went on, generally took the form of a fixed rent. From these men arose the free socage tenants, the yeomanry of England.

Here, then, we have a picture of the internal arrangement of a feud, or, as it seems to have been called, at least in England, when looked at from inside, "a manor."

The lands comprised in it were of two kinds. Some were retained by the lord for his own use or pleasure, and were called *terre dominicales*, or demesne lands, while others were, as we have seen, let out to tenants to be held of the lord by certain base services.

The demesne lands again were divided into those which were kept by the lord for purposes of actual occupation and enjoy-

<sup>b</sup> The former are considered by Hallam to have been the only villeins found in England after Henry II.'s time.

<sup>c</sup> That is, lands held as absolute property.—See Robertson's 'Charles the Fifth,' Proofs and Illustrations (9.)

ment by himself and his family, his gardens, orchards, and parks; those which were tilled by his villeins in the manner we have shown above; and those which were waste or barren and served for public roads, and for *common of pasture* to the lord and his tenants. These waste lands were called "the lord's waste,"<sup>d</sup> and what is left of them forms the *commons* of modern times.

Having thus sketched the rise and general character of the feudal system and described the internal constitution of a feud, we must now examine how far the feudal system was introduced into England, and what was the character of its domestic economy in this country.

It is a question which has been the subject of much controversy whether lands were held feudally under the Saxons or whether that description of tenure was introduced at the Norman Conquest. Sir Henry Spelman, in his treatise on feuds, strongly maintains the latter position; but according to Mr. Hallam the balance of authority is tolerably even, and he considers that "the prevailing bias of modern antiquaries" is in favour of the earlier introduction of feuds in at least a modified form. The difficulty of determining a point of law such as this is evidently rendered very great by the fact, that nearly all our accounts of our Saxon forefathers come to us through the hands of men who were familiar with the usages and terms of feudal law, and would therefore be led to apply them to institutions and things having perhaps only an apparent similarity. There seems at all events to be little doubt that the feudal system among the Normans on the Continent was very much more matured than in the neighbouring island, so much so in fact that the form introduced by them was virtually a different system.

With regard to the internal constitution of feuds, that manorial system which has been so marked a feature in English history, though it may not be possible to follow Lord Coke in his assumption of the existence of manors of a feudal character in Saxon times, yet it seems probable that something of the kind was known then. There were "great men," thanes or earls, holding large estates, to whom were attached, perhaps only by the custom

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<sup>d</sup> Steph. Com., bk. ii. pt. 1, ch. 2.

of personal commendation,\* besides villeins and lesser thanes, certain inferior landowners called socmen, because they had lands in the *soc* or franchise of a great baron. The tenure of socage was certainly Saxon by name and nature, though modified like all else by Norman feudalism. Since socmen were necessarily, even in Norman times, connected with a manor, most likely the latter also was of Saxon origin, though remodelled and christened with a Norman name. The word *manerium* occurs frequently in Domesday Book, but not, it is said, in documents before the time of Edward the Confessor.

But whatever traces of manors and other institutions which afterwards became feudal existed in Saxon times, the introduction of feuds in a mature form must be attributed to the Normans. No sudden and arbitrary change of tenure was commanded by them; but gradually the burdens and liabilities of the strict feudal system were fastened on all the lands of the kingdom. The number of the English nobility slain at the battle of Hastings was so great, that from this cause alone large territories became forfeited to the new king, who granted them out to his followers, to be held of him subject to all the feudal incidents known in Normandy. How and when those Saxons who were still allowed to hold lands submitted themselves to the same tenure is not quite certain. But it is probable that the system gradually gained ground during the first twenty years of William's reign; for in 1085, immediately after the apprehended invasion of England by the Danes, the king at Sarum or Salisbury received the homage and fealty of all the landholders in England who agreed to hold their lands by military tenure. It was probably at this council that the law was passed which formally established in England the system of feuds. It was in these words: "*Statuimus ut omnes liberi homines federe et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*"

If, as seems probable, this proceeding was the formal inaugu-

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\* That is, personal attachment. *Vide* | and ch. viii. part i. 1st vol. pp. 163, et  
Hallam's 'Middle Ages,' ch. ii. part i., | *seq.*, and 2nd vol. p. 293. Ed. 1853.

ration of feudalism in England, it is curious that at the same time and by the same Act an essential innovation was made upon its practices. Under the strict system (as we have seen) no oath of fealty was due from a vassal to any but his immediate lord. But William required this oath from all landholders in England, whether holding in chief or as tenants of some other lord. He was probably encouraged in his demand by the fact that an oath of allegiance had been taken from their subjects by the Saxon kings. The custom thus introduced prevented that anarchy and aggrandisement of the nobility at the expense of the Crown which for more than a century after this time prevailed in France.

In other respects feudalism, when introduced into our island, bore all the essential features above described. All lands were holden either mediately or immediately of the sovereign.<sup>f</sup> The most honourable and perfect tenure was that by knight's service, which was liable to the incidents of aids, reliefs, fines on alienation, escheat, and forfeiture, and also gradually contracted the additional burdens of wardship and marriage, besides others of less importance which it is unnecessary to particularise here. Besides this perfect tenure, there existed that imperfect kind which has been already alluded to, and which in England retained the marks of a Saxon origin in the name of *free-socage* tenure. There were also the usual attendant villeins who held by two different tenures. These were, first, pure villenage, which, in the time of Bracton,<sup>g</sup> seems to have been identical with the *serfdom* of the Continent, the villein holding upon condition of doing whatever was commanded; and, secondly, villein-socage, which was the tenure of those villeins who held of the king, tilling his demesnes. The great barons, or lords, held large estates comprising forty, fifty, or a hundred *manors*,<sup>h</sup> these manors being again held of them by inferior lords upon knight's service, and each individual manor being parcelled out in the way already described.

<sup>f</sup> Co. Litt. by Hargrave, 65 a. Also n. (1) to same.

<sup>g</sup> Henry II.

<sup>h</sup> It has been computed that the Earl of Moretaine, the Conqueror's half-

brother, held 793 manors; and ten Norman barons are mentioned by Brady who held more than 100 each. *Vide* Ellis's 'Introduction to Domesday Book,' p. lxxii.



It is very difficult to find any exact definition of an English manor. The relation in which it stands to feuds generally, to baronies, or to knights' fees, is nowhere stated. It is spoken of vaguely in law-books as a district of ground held by a lord or great personage. In some of the early writers, *e. g.* Britton, the word is very seldom used, and when used appears to be convertible with vill or barony. Lord Coke, in his 'Compleat Copyholder,' endeavours to give a somewhat more scientific description. Using the phraseology of the scholastic logic, he declares that a manor has "two materiall causes," an efficient cause, and a *causa sine qua non*. The "two materiall causes" are demesnes and services. Demesnes, following Bracton, he considers to be lands (held, of course, ultimately of the king) enjoyed by the lord himself in his own possession, and lands let out to the inferior copyholders, who, being merely tenants at will, had no legal estate in them. The services meant are those due from the freehold tenants of the manor. The *efficient* cause of a manor he considers to be "long continuance, for, indeed, time is the mother or rather the nurse of manors." From this he argues that not even the king could make a manor, it being necessary that it should have tenants holding by custom time out of mind. No "common person" could create a manor in Lord Coke's days, for another reason. By the statute of *Quia emptores terrarum*,<sup>1</sup> passed in the reign of Edward I., it was enacted that no man should enfeoff another of land to be holden of him as lord, but, if he conveyed his land by feoffment, the feoffee should hold of the same lord and by the same services as his feoffor had previously done. Consequently, no subject could, since the passing of that Act, create a perfect tenure, *i. e.* a tenure "between very lord and very tenant in fee." But, according to Lord Coke, "a perfect manor cannot subsist without a perfect tenure, and therefore it has been impossible, since the passing of the above-mentioned Act, to create a manor." All this Lord Coke evidently intends to include in his efficient cause of a manor when he defines it as "long continuance." The *causa sine qua non* is a court-baron, which he considers

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<sup>1</sup> 18 Edward I. c. 1.

to be the "chiefe prop and pillar of a manor, which no sooner faileth but the manor falleth to ground." Of these courts he speaks at some length, and we will shortly recur to his observations. Such, then, is the most detailed and exact description of a manor that it appears possible to find. It gives a key to the internal constitution of the manor, but, as before observed, leaves us quite in the dark as to the relation of a manor to a fee. That there was in the English law some limit to the smallness of a knight's fee (though any such line was foreign to the original feudal spirit) there is no doubt. The matter is discussed by Lord Coke in 'The Copyholder,' who believes that a knight's fee was first regulated by size and afterwards by value, and gives various inferior limits, as 1920 acres, 680 acres, 480 acres, 15*l.*, 40*l.*, 20*l.* per annum.<sup>\*</sup> It seems most probable that a manor was limited in the same way; that a manor was, in fact, merely another name for a knight's fee, or *beneficium*, given to it when it was looked at in respect of its internal domestic economy, and not in respect of the services to be rendered for it.

Another definition of a manor, which appears to be founded upon some observations of Lord Coke, in his treatise upon Littleton, confirms this view. According to this definition, "a manor commenced where the king granted lands with jurisdiction to another, who before the statute *Quia emptores terrarum* granted parcel of them to others to hold of him by certain services." From this it would appear that a manor was any fee to which was attached a right of jurisdiction, the power of holding a court-baron. It would, however, always be a knight's fee. This definition is supported by some quotations from Bracton, given by Lord Coke,<sup>1</sup> in which it is distinctly stated that a capital manor (one held in chief) may contain many manors under itself. The words "honour and barony," therefore, would simply seem to mean a manor of great size.

On the internal constitution of a manor we have, as has been seen, plenty of information. A short description of its general

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<sup>\*</sup> The latter measure was fixed by Stat. Ed. II. De militibus.

<sup>1</sup> Co. Litt. 58.

character has been already given, which will apply exactly to the English variety, if, indeed, the term was ever used in other countries. It comprised, first, the lord's demesnes, parts of which were held by himself, parts were tilled by his villeins, and part was his *waste*; and, secondly, the lands which he had let out to be held by free tenants on certain services. At the time when our earliest legal treatises were written the villeins who tilled the lord's demesnes had no property, and, if they lived in separate houses and had any land for their own maintenance, such houses and lands were merely held at the will of the lord, who could eject them at his pleasure. The whole of the lord's demesnes were strictly in his own hands and at his disposal; but in later times the tenure of the villeins became fixed by custom, and first public opinion, and then law, came to their assistance and rendered their property secure as long as they performed the stipulated services to their lord. Thus the division of demesne lands became important. Only what the lord actually occupied and tilled for his own benefit could really be called his own, and in time it came to be doubted whether the title of demesnes could properly be applied at all to his villeins' lands, which were then called copyhold lands.

The lord of a manor, consequently, soon had to recognise two kinds of tenants, freeholders and copyholders. His duties towards the one and the other were, however, quite distinct. Those which he owed to the copyholder were entirely regulated by custom, and therefore varied in different estates or manors. A customary court was held for these tenants, which was perfectly distinct from the court-baron or freeholders' court, and which might be held without the latter tenants. In this court the lord or the steward of the manor was judge, and its business was to take the surrender of copyhold lands from the tenants and admit others thereto. This court might, in certain cases, be held by a person who was not the lord of the manor. Thus, if the lord granted away the inheritance of all the copyholds within his manor, whereby they became severed from the manor, the land would still retain its copyhold character, and the grantee might hold customary courts, and take surrenders and

grant by copy of court-roll;<sup>m</sup> but, in such a case, the grantee had no power to hold a court-baron. Again, there was no bond between the lord and tenant, such as homage and fealty. The copyholder held at the will of the lord, regulated by the customs of the manor, and his services were likewise regulated by the same customs. By *special custom* a copyholder might have common and even sole pasture for his cattle in the waste of the lord,<sup>n</sup> but he could not claim common of general right, as a freeholder could. In many other respects, too numerous to mention, a copyholder's estate was varied and defined by custom, but however good a tenure it might practically be, it has never attained the dignity of that of a freeholder. The free tenants of a manor were either tenants by military or by base services. Those tenants who held by military or knight's service were mostly themselves lords of manors, and they played no other part in the economy of the larger manor than was comprised in the right to attend and act as judges in the court-baron, and to bring before that court any proprietary action, or action founded upon writ of right, which they instituted<sup>o</sup> concerning property in the manor. Those tenants who held by agricultural or *base* services were said<sup>p</sup> to hold their tenements in *free-socage* with the service of fealty only, or with fealty and homage, according to some authorities. The characteristic of socage tenure seems to have been the certainty of the services incident to it. Thus, Littleton<sup>q</sup> says, "Tenure in socage is where the tenant holdeth of his lord the tenancie by certeine<sup>r</sup> service for all manner of services, so that the service be not knight's service." As, for example, to hold by fealty and certain rent, by homage, fealty, and certain rent, by homage and fealty only, or by fealty only, or by fealty and certain corporeal services, such as ploughing and sowing the lord's demesnes on certain days in the year;—to hold in any of these ways was to hold by socage tenure. Littleton supposes that the services incident originally upon socage tenure were always of an agricultural nature, and were afterwards commuted for a rent, but this seems uncertain. The

<sup>m</sup> Comyns' 'Digest,' tit. Copyhold (B 2).

<sup>n</sup> Ibid (K. 6.)

<sup>o</sup> Britton, ch. cxx.; Glanville, b. 12, c. 3.

<sup>p</sup> Bracton, b. 4, c. 20. See App. (A.).

<sup>q</sup> Sec. 117.

<sup>r</sup> *Sic.*

chief incidents of this tenure in England were wardship, marriage, aids, relief, primer-seisin, and fines for alienation (the latter two only applying to the king's socage tenants *in capite*), escheat, and forfeiture; but the two most burdensome incidents in tenure by knight's service, wardship and marriage, were in the case of this tenure no burdens at all. When the inheritance descended to an infant under fourteen the lord of the fee was not made guardian, but the nearest relation to whom the inheritance could *not* descend. This guardian was strictly accountable to the heir for the rents and profits of the estate, and was obliged to relinquish his post when the latter had attained the age of fourteen. If he married his ward under the age of fourteen, he was bound to account to him or his executors for the value of the marriage, although he took nothing for it, unless the marriage was a good one.\* Aids and relief, too, were fixed in socage tenure, and therefore pressed lightly upon the tenant.

And, while socage tenants were in so many respects in a better position than tenants by knight's service, they were under no disadvantage in respect of their relation to the lord. The oath of fealty taken by the tenant in socage was in the same form as that taken by the military tenant, and homage when performed was in the same words.<sup>†</sup> Thus the mutual obligation to fidelity subsisting between tenant and lord was equally strong in the two cases. Homage and fealty (but especially, perhaps, the first) are invariably stated by our early writers to have imposed as strict duties upon the lord as upon his tenant. Glanville says,<sup>‡</sup> "that the relation of fidelity between dominion and homage ought to be reciprocal, nor does the tenant owe more to his lord in respect of homage than the lord owes to the tenant on account of dominion, reverence alone excepted." Britton, who wrote in the reign of Edward I., corroborates this, by saying <sup>§</sup> that "homage is a legal bond whereby a person is bound and obliged to *warrant, acquit, and defend* his tenant in his seisin against all persons for the services due from the tenements which he holds of him, and whereby, on the other hand, the tenant is obliged and bound in return to

\* Litt. s. 123.

† See forms in Appendix (B).

‡ B. 9, c. 4.

§ C. 68, sec. 1.

perform to his lord the services due from the tenement which he holds of him in service or in demesne, and to keep his faith towards him inviolate; and the lord is thereby as much bound to his man as the man is to his lord, reverence only excepted." Bracton and Fleta<sup>7</sup> speak to the same effect, as also do certain foreign writers. Thus the duties of the lord to all those tenants, whether by socage or knight's service, who had performed homage to him, were very solemn and important, and those which were involved in receiving the oath of fealty could not be very different, since the words used in the two ceremonies so nearly correspond. The lord was not to do anything to the damage or disherison of the tenant,<sup>8</sup> or he forfeited his seignior; he was to warrant his title to the land held of him, and, in case this land was recovered against the tenant by a third person, to reinstate him therein, or give him land of an equivalent value.<sup>9</sup>

The court-baron, which, as we have seen, was an essential to a manor, was an institution also showing the dignity and power of the freeholders. It is described generally by Blackstone<sup>b</sup> as a court of Common Law, being the court of the barons or freeholders, "for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge." That the freeholders (who were also the suitors) were the judges of this court, is stated by Lord Coke, in his 'Compleat Copyholder,'<sup>c</sup> who says that, for this reason, an action for debt would lie in a court-baron for the lord himself. The business of the court was, in the first and principal place, to determine by a writ of right all controversy relating to the right of lands within the manor. It had also jurisdiction in personal actions where the debt or damages were under forty shillings.<sup>d</sup>

It appears, also, that it was the duty of the court to empanel a jury, who were charged to inquire into the internal affairs of the manor, and present or state the result of their investigations to the court. The subjects they dealt with were of the

<sup>7</sup> Bracton, 78; Fleta, b. 3, c. 16.

<sup>8</sup> Brit. secs. 25 and 26.

<sup>9</sup> Glanville, b. 9, c. 4.

<sup>b</sup> Vol. iii. c. 4. ii.

<sup>c</sup> Sec. 81. See also Co. Litt. 58 a.

<sup>d</sup> Blackstone, *ubi sup.* Comyns' 'Digest,' tit. Copyhold (R. 13).

following kind :—What suitors had made default in doing suit, who were the heirs to dead tenants, and what profit accrued to the lord by such death in the shape of relief, heriot, &c. ; whether any tenants had forfeited by alienation, waste, or other means ; whether any lands or services had been subtracted from the lord ; what encroachments or trespasses there were in his demesnes or waste, and what *inclosure* or *surcharge of common*° was complained of.

Our old writers do not enter very fully into the nature of courts-baron. Glanville, Bracton, and Britton all state the necessity of beginning an action founded on a writ of right in the court of the lord of whom the tenement in dispute was held, and then explain how such an action may be transferred to the County Court and thence to the King's Court. Britton especially notices so many ways in which this transfer may be made, that it is evident that even in his time these actions when of any weight were never heard out in the court-baron. The lords, it seems, were not averse to the waiver of their jurisdiction, as holding these pleas brought them little or no profit.<sup>f</sup>

A court-baron is carefully distinguished by Lord Coke from a court-leet, with which it is sometimes confused, and in drawing the distinction several characteristics of a court-baron are mentioned.<sup>g</sup> The most important of these have, however, been already noticed.

The function of the court-baron by which it inquired into the internal concerns of the manor seems to be very important, but is hardly noticed by Lord Coke or early writers. It seems, indeed, to have been a jurisdiction rather of a declaratory than a coercive nature ; but it is specially interesting as showing the way in which the freemen of a manor dealt with their own affairs, and the footing of legal equality with their lord on which they stood. Thus, in the matter of common-rights, with which we are specially concerned, the jury of freemen were charged to inquire into<sup>h</sup> any case of surcharge, inclosure, or trespass, and, on their report, it was the lord's duty to interfere.

\* Comyns' 'Digest,' Cop. (R. 12) ;  
Kitchin, of Courts, 546, *et seq.*, p. 107,  
*et seq.* 4th edit.

<sup>f</sup> See also generally on the subject of

courts-baron, Britton, ch. xxvii., the substance of which is given in Appendix (O).

<sup>g</sup> Co. Cop. sec. 31. See App. (O).

<sup>h</sup> Kitchin, 'Jurisdicts,' p. 115.

We have, indeed, here a proof that the manorial waste could not by the Common Law be inclosed by a tenant without the assent of the freeholders as well as the lord. For, it is said,<sup>1</sup> "if any tenant hath inclosed any land, and keeps that in severalty (which was wont to lie open) without the license of the lord and other freeholders, that is also inquirable, for that no tenant shall lose his common in that." On other points the opinion of the freeholders seems to have been equally sought for and of equal weight.

Courts-baron have now become obsolete. The Writ of Right has been abolished; and though the jurisdiction in personal actions still remains, yet other courts of a more modern character and easier of access, having like jurisdiction, have taken its place. By statutes 9 and 10 Victoria, c. 95, which established modern County Courts, the lord of any hundred, honour, manor or liberty, having any court in right thereof, in which debts or demands may be recovered, is enabled to surrender that right to the Crown, after which the right itself is to cease and determine. It appeared by the Judicial Statistics of 1859, that five courts-baron and five hundred-courts still preserved at that time some signs of vitality.

To sum up, then, the conclusions already arrived at, we may say, that the relation anciently subsisting between the lord and his freehold tenant was one of mutual fidelity, the tenant undertaking to perform certain definite services, and the lord undertaking to preserve him in his rights, and to recognise his privilege of sharing in the regulation of the affairs of the manor through the instrumentality of a court-baron. Any relation of this close and reciprocally protecting nature will now be sought for in vain between lords and tenants of real or reputed manors; and its absence alone affords a strong reason for jealously watching any attempt to use those rights which, if formerly valid, brought with them obligations that have now become inoperative. The whole scheme of rural society has changed in spirit yet more than in form. Care must be taken that the change affects fairly those who bear the same relative positions as lord and tenant of old.

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<sup>1</sup> Kitchin, *ubi sup.*



Among the rights of the freehold tenants of a manor were those of common in the lord's waste.<sup>k</sup>

In discussing these rights it is necessary to guard against the confusion that may arise from the different meaning attached to the word common in modern and ancient times, or rather, perhaps, in popular and legal usage. A common is now popularly understood to be a tract of waste ground—an open space—over which any one may roam without fear of trespass. But a tract of ground so denominated was formerly, and is now in a strict legal sense, merely called a "waste." The word *common* does not signify land at all. It is used to designate a *right of usage and enjoyment* in a certain manner, and is so used because, as Lord Coke says in his comment upon Littleton, the right was *common* to many. Littleton, he adds, speaks of *common* of pasture, "for that the feeding of beasts in the land wherein the common is to be had belongs to *many*." So an earlier writer, Britton, defines common of pasture (the most important kind of common) on the same principle. "Common," he says, "is a general name,<sup>1</sup> and no community can be so restricted, but that it be understood that there are at least two or more *parceners* to whom it is common. And it properly signifies that one person has a *right to common with another in another's soil*." Bracton and Fleta likewise, almost in the same words, state that common is a general name, and that it is used only in respect of a right relating to another's soil and enjoyed with others.<sup>m</sup>

Rights of common in early times were not confined to pasture, but extended to turbary or cutting turf, piscary or fishing, digging for coals, minerals, and the like, and estovers or *estouviers*,<sup>n</sup> which meant the liberty of taking necessary wood

<sup>k</sup> This right chiefly relates to socage tenants, as the nature of its origin shows. A tenant by knight's service would probably have a manor and waste of his own, and in any event would hold sufficient land to pasture his own beasts. It seems, however, Viner's 'Abridgement,' tit. Common, E. 6, that a man might prescribe to have common appendant to his *manor*.

<sup>1</sup> "Un noun commun."

<sup>m</sup> Bracton, b. 4, c. 39; Fleta, b. 4,

c. 19. Bracton's words are as follows:—"Commune autem nomen generale est, et convenit suis partibus, sicut genus se habet ad suas species. Communia enim ex virtute vocabuli componitur ex una et cum, et subintelligitur alio, id est, communia in alieno et una cum alio et non in fundo proprio, quia nemini servit suus fundus proprius."

Fleta follows him almost word for word.

<sup>n</sup> French, *estoffer*, to furnish.

for the use or furniture of a house or farm.\* But common of pasture was so much the most important of these rights that it has always usurped the greater part of the attention of writers on the subject. It will therefore be better to follow their example and trace the history of this right of common, in doing which sufficient light will also be thrown on the other kinds, all being of essentially the same character.

Our early writers, some of whom we have quoted above, though giving us valuable information as to the law of common of pasture in their days, do not attempt to explain the origin of the right. If, however, we turn to treatises of a somewhat later period, we shall find this want supplied. Viner, who continued Rolle's 'Abridgement,' a work compiled in the reign of Henry VIII., states<sup>p</sup> that "if the lord of a manor, before the statute *Quia emptores terrarum*, had made a feoffment of parcel of the manor to hold of him, the feoffee, as incident to the grant, should have had common in the wastes of the lord. And this for two causes: 1st. As incident to the feoffment, for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, and consequently the tenant should have common in the wastes of the lord for his beasts which do plough and manure his tenancy, as appendant to his tenancy, and this was the *beginning of common appendant*. The 2nd reason was for maintenance and advancement of agriculture and tillage, which was much favoured in law."<sup>q</sup> It will be seen that Viner only professes to explain by this passage the beginning of a particular sort of common—common appendant. There seems, however, to be little doubt that the distinction between different sorts of common of pasture, which is here referred to, and which we will presently notice, is one that did not originally exist. It is not noticed by Glanville, or even by Britton, who wrote several reigns afterwards, though in the latter writer the origin of the distinction may be traced. We may therefore fairly conclude that, in describing the origin of common appendant, which has always been considered the most ancient kind, and the only one that could be claimed

\* Co. Litt., 122 a.

<sup>p</sup> Vin. Abr., tit. Com. (C. 4), and note.

<sup>q</sup> See 2 Inst. 86. Also Tyringham's

Case, 4 Rep. 37<sup>a</sup>, upon which Viner's Law seems to be directly founded. See Appendix (D).

of common right,<sup>r</sup> Viner really describes the origin of that right of common upon which all the different varieties are founded. His description agrees with those conjectures which would naturally arise from a knowledge of the nature of the feudal tenures and relations. We have seen that a tenant by socage tenure was one who held part of the lord's lands on render of certain fixed services, not military. Such a tenant would be dependent for his livelihood entirely upon agriculture. If his holding were not very large he would be obliged to turn it all into arable land in order to support himself and his family, and pay his dues, which were perhaps originally paid in corn and other kind, to his lord. It would therefore be both the duty and the interest of the lord to afford him the means of tilling his land, by turning his beasts that ploughed and manured his fields into those parts of the manor which were not at that time used for agriculture, but were well adapted for this purpose. It was his duty, since he was bound to protect and ensure the tenant's enjoyment of his lands so long as he performed his services. It was his interest, since, unless such means were afforded, the tenant would be unable to pay his dues. Thus the right at first arose; afterwards it would be a condition, tacitly understood, upon the feoffment to the new tenant.

Another and slightly different version of the origin of this right seems, however, to have been sometimes given. According to this version, common appendant took its rise from the practice which subsisted of tenants of a manor being obliged by their tenure to plough and till the *lord's* lands. As their cattle, it was said, were to be employed in the lord's service, it was but fair that they should be maintained on his waste. This theory has much plausibility, since, as we have already noticed, it has been conjectured by Littleton that all socage tenure was once tenure by corporeal services. Yet as this is by no means certain, tenure by rent always coming under the designation of socage tenure in times of which we have exact information, and as the right of common always seems to have had reference to the tenement to which it was appendant, rather than to the

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<sup>r</sup> Co. Litt., 122 a.

services of him who claimed it, the first explanation may safely be considered the more correct one.

A practical question was held to turn upon the correctness of these rival theories in a case heard in the reign of George II.\* In this case, in which the question was whether, when 'a tene-ment to which common was appendant was divided, the holder of each part had a right to common as many beasts as the holder of the whole had formerly, it was decided that the right of common originally belonged to each tenant, for his own benefit, for the pasturing of the beasts he was to use on his own land, and that, consequently, the number of cattle pastured must, in every case, be in proportion to the land to which the common was appendant for the time being. We thus have the sanction of modern as well as ancient<sup>†</sup> authority, for preferring the first-mentioned explanation of the origin of commoners' rights, viz. that they were incident to his tenure for his own beasts. The other rights of common which have been mentioned were evidently established in the same way. They all had for their end, to maintain and advance the tenant in his pursuit of husbandry, his success in which was equally an object of desire to himself, his lord, and the nation. Consequently, as Blackstone says, common of piscary was given him for the sustenance of his family, common of turbary for his fuel, and estovers for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

In accordance with the end for which these privileges were given their exercise was regulated. A man might only use common of pasture (as of common right) with commonable beasts," which were horses and oxen to plough the land, and kine and sheep to compester or manure it. His common of turbary was confined to such turf as he burnt within his house; his common of estovers to furnishing his house and instruments of tillage.

Again, common of pasture could not originally be claimed for any number of beasts, or, as the old writers express it, no one could claim "common *sans nombre*," but the right only extended to such beasts as were "*levant and couchant*" upon the land

\* M. S. Rep. Mich. 14 Geo. II., C. B. *Bennett v. Reeve, et al.* Willes' Rep. 231.

† That of Tyrringham's Case, as quoted in note to § 324, and Appendix (D).

\* Co. Litt., 122 a.

of the claimant, *i. e.* were maintainable upon his land in the winter.

It could not be appendant to houses and pasture land, but only to arable land, since the reason for common being wanted was, that there was no pasture in the tenant's own land.<sup>a</sup> It could not be such a right of common as would shut out the lord of the manor, even though he had granted common without number.<sup>7</sup> The lord being seised of the wastes in which the tenants had common, might feed the common *per mie et per tout* (*i. e.* through each and every part) of common right without disturbance.<sup>8</sup> But though the lord could thus feed his own beasts, he had not unlimited power of feeding the beasts of others. For it is said that the license of the lord to a stranger to put the beasts into the common was good, *if sufficient common were left for the commoners.*<sup>a</sup>

Also, it was not lawful for him, having obtained warren from the king in the manor, to use that warren and put conies into his waste in prejudice of the commoners, *i. e.* he might not for his own gratification interfere with their rights.<sup>b</sup> And this ancient kind of common was so necessarily incident to the land, that it could not be severed from it; but if the land were divided never so often, every little parcel of it was entitled to common appendant.<sup>c</sup>

Such then was the character of that common of pasture which could be claimed of common right, as it is described by those writers who have treated of the matter systematically and *in extenso*. No doubt some of the regulations on specific points were the fruit of subsequent legislation, but the spirit of the original institution seems to be clearly indicated; and from the law as it stood in the days of Lord Coke and the compilers of the 'Abridgements,' we can guess with tolerable certainty at the original relation of lord and tenant in the matter of this right.

But it may be well to glance for a moment at the passing observations, on the subject of common-rights, which our earlier

<sup>a</sup> Vin. Abr., tit. Com. (E.)

<sup>7</sup> Ibid. (A.)      <sup>8</sup> Ibid.

<sup>a</sup> Ibid. *Smith v. Feversell*, C. P. 2.

Mod. 7; H. T. 1673; 1 Freem. 190.

<sup>b</sup> Vin. *ubi sup.*

<sup>c</sup> Bac. Abr., tit. Com.

law writers let fall. The earliest of these, Glanville, who wrote, as before stated, in the reign of Henry II., gives us no further information than is contained in the forms of two writs<sup>4</sup> to the sheriff, one for the admeasurement of a pasture which it was complained had been surcharged, and the other for the trial of a complaint that one had been disseised of his common of pasture "in such a vill which belonged to his freehold in such vill or in that other vill." Such brief notice is just enough to show that rights of common of pasture were sufficiently important to originate actions at law.

The succeeding writers, Bracton, Fleta, and Britton, follow a similar method in treating of rights of common, but discuss the subject at much greater length. Bracton and Britton both speak of them in describing the assize of novel disseisin, the nature of which will be immediately explained. Fleta, who mostly follows Bracton very closely, speaks of common of pasture when treating generally of actions concerning things.

It will be unnecessary to enter at length into the remarks of these writers, which refer in part to the details of the remedial processes to which rights of common gave rise. It is sufficient to notice two or three conclusions which it seems fair to draw from the general tenor of their remarks.

The first and most important of these is, that rights of common were substantial privileges which were maintainable at law. Though a person claiming common of pasture in another's soil had no interest in that soil, yet he had a certain right over it, and could prevent by legal process any dealings with it which would prejudice this right.

Sufficient importance was considered to attach to these rights to cause the institution of two kinds of actions respecting them. The assize of novel disseisin was the process brought to recover common of pasture and damages, when the injured party had only lately been dispossessed of his rights. The time within which the aggression must have been committed was in the original writs, "since the king's voyage to Normandy, A.D. 1184." When this process did not apply, or when seisin had been regained by it on the ground of long sufferance only, the

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<sup>4</sup> B. 12, C. 13. B. 13, C. 37.

writ of *Quo jure* might be brought which tried the right of the claimant to his alleged common of pasture.

The second conclusion is, that the right of common of pasture was not treated in their day as one exclusively between a lord of the manor and his tenant, but as one between any owner of soil and any man having or claiming a right of pasture on that soil.<sup>e</sup>

There are indeed some cases in which the manorial origin of common-rights is indicated.

Fleta,<sup>f</sup> in the passage in which he mentions the provisions of the statute of Merton, explains (following the preamble of the statute) that there were many great men who had enfeoffed knights and free tenants of small parts of their manors, whereby these tenants had become entitled to common of pasture in the whole of the lord's wastes, so that he could not inclose and improve any of it, though there would be plenty left for common of pasture, and means of ingress and egress to the tenants on what remained.

Britton,<sup>g</sup> again, seems to point to this origin, when he says that "None ought to common in respect of any purchase in seasons of reasonable prohibition . . . . no more than within the curtilage, or in gardens, orchards, or parks, or in demesnes which the lord may fence in or inclose at his pleasure."

But the most important of the allusions to the lord of the manor in connection with common of pasture is contained in the chapter on the writ of *Quo jure*.<sup>h</sup>

In this chapter it is stated by all these writers that no one could proceed by this writ but the chief lord of the manor or vill in which the common or the principal part thereof lay. It was, moreover, necessary, in order that this writ might lie, that the tenement to which the plaintiff alleged the common to belong, and the soil of the common, should be of different fees, or of different baronies, or of different feoffments, so that the plaintiff and the person of whom he claims (or, as it is in Bracton and Fleta, "the lord who seeks and he against whom

\* It must, however, be noticed that the word which Britton uses to designate the owner of the soil is "seignur."

<sup>f</sup> Fleta, b. 4, c. 20.

<sup>g</sup> Ch. 55.

<sup>h</sup> Fleta, b. 4, c. 24; Britton, c. 59; Bracton, b. 4, c. 40.

his rights are sought") did not hold their tenements and their pastures in common, but in severalty. For (the books go on to say) this writ does not apply to several feoffees of one lord, in which case the common is more properly called vicinage, but it only lies between lord and lord. Here, then, we have a distinct reference to the interests which lords of manors had in rights of common; and it seems that one lord could claim common in another's manor for himself and his tenants. But in this passage even the right is not treated as between lord and tenant.

If now we turn back to reconsider the proceedings by writ of novel disseisin we shall find little prominence given to this last-mentioned view of the case. The exceptions<sup>1</sup> which are brought against the writ are some of them such as a lord of the manor might use, *e. g.* that the person claiming common was his villein; but others may apply to any case between owner of soil and claimant, *e. g.* that the common had never been enjoyed peaceably, but by force.

And the general remarks upon this subject show still further how far right of common had become separated from original manorial associations. For common of pasture is treated as a thing that may be purchased, and of which seisin<sup>2</sup> may be had in similar manner as of corporeal hereditaments. Thus Britton<sup>1</sup> says that seisin is acquired by putting in a beast, and a *quasi-seisin* by hindering the tillage of the soil, and that a purchase of common is complete for some purposes without seisin, but not for purposes of subsequent alienation. So also the case of a person having common in the soil of a different fee or manor is constantly referred to.

The third conclusion which we may draw from the remarks of these early writers is, that the distinctions between the different kinds of common, which had gained considerable importance in the time of Lord Coke, had not yet been recognised. Rights of common seem to have been in a state of transition in their times. They might be acquired in various ways—"by long sufferance, without other title, with the knowledge and consent of the owners of the soil," by gift, by sale, or by vicinage.<sup>3</sup>

Yet, on the other hand, enough of the old idea of common

<sup>1</sup> Fleta, b. 4, c. 22; Britton, c. 57.

<sup>2</sup> Britton, c. 55.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.



as a right attached to a tenancy of land remained, to make Britton, the latest of these writers,<sup>n</sup> say, that "If any one purchases common of pasture in another's soil and has no tenement to which the common may belong, this is not properly a purchase of common, but a hiring of the pasture or herbage." And he speaks yet more strongly when describing the proceedings on a writ of novel disseisin, where he says, "Afterwards let the plaintiff be asked of what common he makes his plaint, and of how much and to what tenement he claims the common to belong. . . . For if he has no free tenement to which the common may belong he shall fail in his plaint without any other recognizance of the assize."<sup>o</sup> The manner in which the plaintiff answers this inquiry is also worthy of note as illustrating the ideas of how common should be attached to land. It runs as follows:—"He may then say that the common is appurtenant to his free tenement in such a vill by reason that he was enfeoffed of such a tenement, at which time the common was appurtenant thereto, and by such purchase he was seised thereof, and his seisin peaceably enjoyed until he was ejected or disturbed."<sup>p</sup>

Again, with respect to the beasts to be commoned, the law does not appear so definite as in Lord Coke's time, and yet indications are to be found that the beasts were more restricted in kind in one case than another. So, too, it appears that there were cases in which the right of common only held at certain times in the year, and others in which it held at all times,<sup>q</sup> and that the number of beasts commonable differed in different cases, as also the parts of the soil or waste in which the right was claimed, sometimes each part and all parts, and sometimes only a certain part, being subject to it.<sup>r</sup>

It would seem, then, from the general tenor of these early writers' remarks, that in the reigns of Henry III. and Edward I. rights of common had lost somewhat of their original significance. The practice had sprung up of buying and selling them, and of granting them as appurtenant to lands to which they did not originally belong.

<sup>n</sup> Temp. Ed. I.<sup>o</sup> Ch. 56.<sup>p</sup> Britton, *ubi sup.*<sup>q</sup> Fleta, b. 4, c. 19; Britt. c. 58.<sup>r</sup> Britton, on 'Admeasurement of Pasture,' c. 58.

Another practice had also sprung up which we shall see gave rise to a different kind of common. This was the practice which existed amongst neighbouring landowners, of agreeing to allow each other's beasts to pasture promiscuously in their lands.\* The restriction as to the kind of beasts had at the same time become lax, all beasts being allowed to pasture in many cases. These various changes had led to the question of common being considered as essentially one, not between the lord of the manor and his tenant, but between any owner or tenant of the soil and any other landowner or tenant who claimed a right of common for his beasts.

At the same time it must be carefully borne in mind that it is always distinctly understood that there is some owner or lord of the soil in which common is claimed, to whom the soil belongs as absolutely as any other part of his lands, *subject* only to the rights of the commoners.

It is difficult exactly to trace, but not impossible to conjecture, the changes which took place in rights of common from the time of Edward I., when Britton compiled his treatise,<sup>†</sup> to that of Charles I., when Lord Coke wrote his commentary upon Judge Littleton's 'Treatise of Tenures.'

At this time common of pasture was of four kinds, common appendant, common appurtenant, common *pur cause de vicinage*, and common in gross. Common appendant was of common right for beasts commonable, *i. e.* that served for the maintenance of the plough, as horses and oxen to plough the land, and kine and sheep to compester<sup>‡</sup> it, and was appendant to arable land. Common appurtenant was common not only for beasts which were commonable, but also for those which were not commonable, as swine, goats, and geese, and could only be claimed by prescription, *i. e.* by allegation of personal usage by the claimant and his ancestors, not by custom or of common right. This right of common might be for a certain number of beasts, or for the beasts *levant* and *couchant* upon the land to which the common was claimed as appurtenant, but not for

\* This practice is evidently hinted at in the observation that common between feoffees of the same lord might better be called "*viciusage*."

† Probably between the 18th and 23rd years of that reign.

‡ *i. e.* manure.

beasts without number. Common *pur cause de vicinage*, the third kind of common, is said by Lord Coke to be but an excuse for trespass. It was such a right of common as obtained between two neighbouring manors or farms, in which case neither party put their beasts into the other's wastes, but if they strayed thither by themselves it was mutually agreed that no action for trespass should be brought. In this case either party might at any time inclose against the other.

The fourth kind of common, common in gross, appertained to no land, but could be claimed only by deed or prescription. It might be for a particular number of cattle, or for cattle *sans nombre*, which expression in this case, some have thought, might be construed literally. These four kinds of common of pasture have been studiously distinguished in our law since Lord Coke's time, and still exist.

As above stated, it is not impossible to conjecture how such distinctions arose. Britton \* states the ways in which common may be acquired, thus:—"Common is acquired by gift, where one gives to another any soil with common appurtenant; and by sale, as if one buy common in another's soil, so that for ever after it be appurtenant to his own soil, although the two soils be in different fees or different baronies or counties, so long as they are adjoining; by vicinage also, as if one neighbour gives common to another, or the reverse; or by long sufferance without other title with the knowledge and consent of the owners of the soil." Now from the first of these modes of acquisition, common appurtenant and common appendant may both be traced, the common having either the one character or the other, according to its original connection with the tenement. From the second mode common appurtenant is at once derived, and by a slight development of the practice described (a development which had *not* taken place in Britton's time), we arrive at common in gross. From the third mode we trace at once common *pur cause de vicinage*. From the fourth, we again derive common appurtenant and common in gross.

It is unnecessary to enter at length into the modes by which these changes were brought about. It is sufficient to notice that the general cause of them was the decline of the feudal

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\* Ch. 55.

spirit, and the growth of those modern ideas on the subject of landed property, in the light of which land and all its appurtenances are looked at as things that may be bought and sold in the same manner as moveables. It is easy to see that, with the incoming of these ideas, the owners of soil in which others had rights of common would look jealously on such rights; would, if possible, try to make a profit from their exercise, or endeavour to put an end to them and regain the absolute power over the lands they held. The observations we before made in reference to the relation of lord of the manor and tenant, looked at generally, apply with equal force when we look at that relation in respect of common-rights. The old feeling of interdependence between lord and tenant has died out. They no longer sit together in the same court and have a voice in the affairs of the whole district around—the affairs of the lord and of all the tenants. They are strangers to each other. Generally, as we shall prove hereafter, the relation no longer subsists in strict law. The so-called lord of the manor has no freehold tenants, but merely a set of copyholders and a seigniority over a tract of waste land. The commoners in his wastes may even be tenants of other manors. It is consequently no matter to the lord whether certain people, basing their claims on antique customs, have their tenancy improved by pasturing their cattle on his waste land. The only view he takes of such a practice is, that it is a troublesome nuisance, which prevents him from exercising full rights of ownership over his land and pushing cultivation to its legitimate limits, extending his park, or entering into some profitable building speculation. He is, perhaps, willing that the people inhabiting neighbouring towns should enjoy fresh air and the pleasurable sight of grass and trees on these wastes. But yet he does not see why his purse should suffer by such use of his land. If he can legally turn it to what is called better account, surely he is not bound to deny himself and prevent the spread of suburban districts because some poor people like to sit and lie about the grass on Sundays. He therefore endeavours to put in force the powers which he conceives he possesses under certain Acts of the Legislature, and to turn the open spaces into parks, fields, or roads of villas. Let us see, then, what powers he really does possess for these purposes, and the reasons why they were given him.

It has been shown above that rights of common were often the subject of actions at law. Anybody who was disseised or dispossessed of his common was at liberty to bring an assize of novel disseisin against the aggressor, when the facts were tried, and, if an aggression had been committed, the injured person was reinstated in his rights. This assize of novel disseisin might be brought by a tenant against his lord, as well as by any other claimant of pasture against any owner of the soil. It seems by the preamble of the statute of Merton, cap. 4, that by this assize at the Common Law the tenant might recover in any case in which the lord inclosed or (in the old and technical phraseology) *approved* his wastes, without reference to the amount of pasture really required by the tenants. If this were so the lord had no power whatever of approving his wastes. Lord Coke,<sup>7</sup> however, in a note on the statute of Merton (after first saying that the lord could *not* approve by the Common Law), states that there was a case on record<sup>8</sup> where the lord approved two acres and left sufficient pasture for his tenants, and upon a tenant's bringing an assize and the special matter being found, the plaintiff *retraxit se*. And in another note, on the statute of Westminster the Second, cap. 46, Lord Coke states that by the Common Law the lord might improve against any that had common appendant, but not against a commoner by grant. This, however, seems very doubtful. There must have been some difficulty attending the approvement even of commons appendant, or two statutes, such as those of Merton and Westminster the Second, would not have been passed in such quick succession. Lord Coke seems, too, to have overlooked the fact that the distinction between common appendant and common by grant was not drawn so sharply and distinctly in the times of Henry III. and Edward I. Probably, if any approvement was allowed by the Common Law, it was of such wastes as had rights of common attaching to them simply by long sufferance without other title, not in consequence of any tenure or grant.

However this may be, the first definite authority for the approvement of commons is contained in the fourth chapter of the statute of Merton. This statute was passed in the twentieth

<sup>7</sup> 2 Inst. 85.

<sup>8</sup> Tr. G. H. 3.

year of the reign of Henry III., at a Parliament holden at Merton, which was not however in all probability attended by any representatives of the people, the first Parliament bearing distinct traces of a representative character being called in the thirty-eighth year of the same king.\*

It was thus no doubt the work of those very "great men" who are mentioned in it; it runs as follows:—

"Also because many great men of England (which have in-  
feoffed knights and their freeholders of small tenements in their  
great manors) have complained that they cannot make their  
profit of the residue of their manors, as of wastes, woods, and  
pastures, whereas the same feoffees have sufficient pasture, as  
much as belongeth to their tenements—

"*It is provided and granted*, That whenever such feoffees do  
bring an assize of novel disseisin for their *common of pasture*,  
and it is acknowledged before the justices that they have as  
much pasture as sufficeth to their tenements, and that they have  
free access, egress, and regress<sup>b</sup> to and from their tenement  
unto the pasture, then let them be contented therewith; and  
they on whom it was complained shall go quit of as much as  
they have made their profit of their lands, wastes, woods, and  
pastures." The statute then goes on to provide that when the  
complainant does not acknowledge that he has sufficient common,  
the question is to be tried, and, if he has not, the disseisor shall  
give damages as formerly, but if he has, then the disseisor may  
make his "profit of the residue and go quit of that assize."

As this is the first occasion in which sanction is distinctly  
given to the approving of wastes, it is important to notice the  
ground on which it is given. The plea on which approvement  
is founded is distinctly that the tenants who have rights of  
common have sufficient pasture and the means of reaching that  
pasture from their tenements, after the inclosure is made, and  
that consequently the lord ought to be allowed to make a profit  
of his lands by means which will do no harm to any one. It is  
assumed (and correctly as we have seen from a glance at feudal  
times) that the waste lands of the manor are as much the lord's  
property as any other part of it, subject only to the commoners'

\* Hallam, 'Middle Ages,' vol. iii. c. 8; p. 3, of 10th edit.

<sup>b</sup> Or, ingress and egress.

rights. Therefore, when these rights were not really injured, it was fair that the lord should make use of his lands. There was indeed a chance that the descendants of the tenants, increasing their number of beasts, or finding a scantier crop of grass, might suffer from the curtailment of common land; but such a chance was considered too remote to be taken into account by the framers of the statute, who by its wording indicated (what was afterwards held) that an approvement once validly made should remain good however the wants of the tenants might increase. In truth, such a contingency was very remote, since the tenants could not at any time pasture more beasts than were *levant et couchant* on their tenements; and the sufficiency of pasture would be calculated not upon the crop of the current year, but the average crop of grass.

The statute of Merton was not capable of universal application to the inclosure of wastes. As remarked by Lord Coke,<sup>c</sup> it extended only to the case of a lord approving against his tenant, not to that of his approving against a stranger, or to that of his tenants approving against him.

It was afterwards indeed held that any person seised of the soil might approve under this statute (*Glover v. Lane*, 3 T. R. 445) as standing in place of the lord of the manor, but even if this were so it could only be against a *tenant* of the manor.

It was also held by Lord Coke and subsequent authorities to extend only to common appendant and appurtenant, and not to common in gross, since the words of the statute were *quantum pertinet ad tenementa sua* (as much as belongeth to their tenements). This was an important limitation in later times, but probably had not much effect when the statute was passed, since common in gross was, according to Britton, then unknown. Again, common of pasture only is affected by the statute, not common of piscary, turbary, or estovers; and (more important still) the Act had no application to copyholders of the manor, whose rights, as we have seen, were regulated by custom and not by the Common Law, and to whom no reference is made in this instance.

In order to extend this statute to the case between the lord

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<sup>c</sup> 2 Inst. 85.

of a manor and tenants of other manors, the 46th chapter of the statute of Westminster the Second<sup>d</sup> was passed. This statute enacted that the statute of Merton from thenceforth should hold place between lords of wastes, woods, and pastures, and their neighbours, saving sufficient pasture to their tenants and neighbours, so that the lords of such wastes, woods, and pastures might make approvement of the residue. But it was provided that this Act should extend only to such as claimed pasture as appurtenant to their tenements, and not by special feoffment or grant. It is also evident that it did not touch the case of approvement between lord and copyholders. There was a minor provision in the statute that "by occasion of a windmill, sheepcote, deyr<sup>e</sup>,<sup>e</sup> enlarging of a court necessary, or courtelage, from henceforth no man should be grieved by assize of novel disseisin for common pasture."

These five kinds of improvement were thus authorised, according to Lord Coke,<sup>f</sup> without reference to sufficiency of pasture being left, and were merely specimens or examples of what might be done. Accordingly it has since been held that the lord may erect a house for a beast-keeper, or necessary for the habitation of a woodward to protect the wood and underwoods on the common. The statute further contained provisions for the protection of those who commenced approvements, and against usurpation of common during the estates of particular tenants. It is to be observed that by this statute a tenant could approve against his lord who had common in his ground, treating him as a *vicinus* or neighbour.

These two statutes were followed up, after a lapse of about two centuries and a half, by an Act passed in the reign of Edward VI.,<sup>g</sup> which confirmed their provisions and added certain others on matters of detail, but did not introduce any new principle or material alteration into the legislation on this subject.<sup>h</sup>

<sup>d</sup> 13 Edward I. st. 1. c. 46.

<sup>e</sup> i. e. cowhouse.

<sup>f</sup> 2 Inst. 476.

<sup>g</sup> 3 and 4 Edward VI. c. 3.

<sup>h</sup> It provided that where certain necessary houses had been built upon commons or waste grounds with ground not above three acres in quantity inclosed

with them, or where gardens, orchards, or ponds not exceeding two acres had been inclosed, these inclosures should be good, doing no hurt and yet being "much commodity to the owner thereof," but where more than three acres had been inclosed the surplus should be restored to the waste.



This Act concluded the old legislation on the subject of approving.

Again there came a long silence. The next general provisions for inclosing commons, which we encounter in the statute book, are contained in two Acts,<sup>1</sup> passed respectively in the 29th and 31st years of George II. These statutes provide for the inclosure by the consent of the major part of the commoners and owners of the soil of any part of any wastes, woods, or pastures for such time, in such manner, and upon such condition as should be agreed upon, in order to promote "the growth and preservation of timber or underwood," or, as it seems from the 2nd section of the Act, the employment and benefit of the poor. These Acts, it will be observed, only sanction inclosure for special purposes and under special circumstances, and grant no power to any lord or owner of soil to act in opposition to the wishes of the majority of the commoners. As before, too, they expressly state that the changes introduced are for the public utility, and the advantage of commoners as well as owners. They contain various special provisions as to compensation to commoners and owners, and the mode of carrying them out.

In the 13th year of the next reign another Act<sup>\*</sup> was passed, entitled "An Act for the better Cultivation, Improvement, and Regulation of the Common Arable Fields, Wastes, and Commons of Pasture in this Kingdom." This Act contained provision for fencing in and managing in concert, under the direction of a field-master or field-reeve, tillage or arable lands lying in open or common fields. The rules, regulations, and restrictions under which this was to be done were to be regulated by a majority of three-fourths of the occupiers of such land; but cottagers or others who had rights of common in such lands were to preserve their rights, unless they agreed to accept a compensation for them. The 15th section of the Act also provided that any lord of the manor, with the consent of three-fourths of those having right of common upon his wastes, might lease for a term not exceeding four years a twelfth part of such wastes, laying out the rent received in draining, fencing, or otherwise improving

<sup>1</sup> 29 Geo II. c. 36. 31 Geo. II. c. 41.

<sup>\*</sup> 13 Geo. III. c. 81.

the residue of such wastes. There are also many other provisions of a like character, and the customary clause in the Act saving all rights.

It must be borne in mind that though we have not yet seen any public general Act for the inclosing of commons (for that last mentioned is not of this character),<sup>1</sup> yet several local Acts had been obtained for the purpose, applicable of course to particular cases.<sup>m</sup> This fact is proved by the title and preamble of the next Act we shall have to refer to, that which long went by the name of "The General Inclosure Act," and which has been the foundation of the legislation on this subject in modern times.

This Act, 41 George III. c. 9, is entitled "An Act for Consolidating in one Act certain provisions usually contained in Acts of Inclosure, and for facilitating the mode of proving the facts usually required on the passing of such Acts." Its provisions are all connected with the mode of procedure in cases of inclosure, and do not touch the question of the right of inclosing. Supposing the advisability of inclosing certain lands to have been agreed upon by the parties interested, and an Act to have been obtained for that special purpose, if the special Act did not contain provisions to meet the same end, this Act became applicable, all the steps to be taken were at once defined, and the law laid down which was to govern the particular situations in which the commissioners to carry out the inclosure might be placed. Under this Act the rights of commoners were carefully protected, it being provided by sec. 6 that they should send in their claims to the commissioners, who (it is implied by another section) should allot them portions of the ground to be inclosed in compensation of their rights. The Act contains a clause specially saving the rights of lords of manors, real or reputed, over the land directed to be allotted, other than and except such interest and other property as was meant to be barred by the Act. There is in addition the general saving clause. This

<sup>1</sup> Having for its object only the regulation and improvement of common fields.

<sup>m</sup> In an excellent pamphlet, recently published, on 'Our Commons and Open

Spaces,' by Mr. Cole, Q.C., it is stated that "under special Inclosure Acts passed in the reigns of Queen Anne, Geo. I., Geo. II., and Geo. III., nearly 3,000,000 acres of waste lands were inclosed."

Act then evidently does not alter the relative positions of lord of the manor and tenant or other person claiming right of common, or give the former any power of approving his wastes which he had not before. After its passing we have cases between lord and commoner on the right of approving, which are decided solely upon the authority of the Common Law and the statutes of Merton and Westminster the Second.<sup>a</sup>

Several Acts were passed at short intervals after the passing of the last Act, but their object was merely to improve the details of its working, and they do not in the least affect the rights of lords of manors or other landowners to inclose.

This indeed may also be said of the Act next mentioned, which was passed in the 6th and 7th years of William IV. c. 115, but inasmuch as the mode of procedure in cases of inclosure is materially altered by this Act, and facilities given for compassing the end desired, it may be well to notice some of its provisions. It is entitled "An Act to facilitate the Inclosure of Open and Arable Fields in England and Wales," and provides that "any open and common arable fields (including any untilled slips or balks therein), or any open and common meadow or pasture lands, or fields in any parish, township, or place in England or Wales, known by metes and bounds, or occupied according to known and legal rights," may be inclosed, without the authority of any special Act of Parliament, with the consent of two-third parts in number and value<sup>b</sup> of the several persons who shall be seised or possessed of, or intitled in possession to, or interested in possession in, any rights of common or other rights" in them. Such inclosure is to be carried out by commissioners nominated by those consenting to the inclosure. But upon the consent of seven-eighths in number and value of persons interested as above in such lands, an inclosure might take place without the intervention of commissioners. The Act, however, by special proviso, is not to extend to "the inclosure of any waste whatsoever, whether the soil thereof shall or shall not be vested in the lord of any manor, and whether with or without the assent of the lord of such manor."

<sup>a</sup> e. g. *Grant v. Gunner*, 1 Taunton, 435, heard Feb. 1809. | the assessments of the poor-rates for the then current year.

<sup>b</sup> The value is to be ascertained by |

It is also not to authorise "the inclosure of any open or common arable fields, or any open or common meadow or pasture land and fields," situate within ten miles of the city of London, or within one mile of any city or town of 5000 inhabitants, or within one mile and a half of any city of 15,000 inhabitants, or within two miles of one of 30,000 inhabitants, two miles and a half of one of 70,000, and three miles of one of 100,000.

Bearing in mind these exceptions to the operation of the Act, it is unnecessary to make any comment upon it, except that it distinctly takes into consideration the moral rights of the general public, as represented by the dwellers in large towns, and not merely the more obviously legal rights of owners and commoners.<sup>p</sup>

This Act was afterwards modified, but in unimportant respects as regards our present inquiry, by the statute 3 and 4 Vic. c. 31.

The General Inclosure Act (8 and 9 Vic. c. 118) now in force, is of more importance than any we have yet noticed, both on account of its positive enactments and on account of the indication it contains of the principles which have guided the Legislature in their dealings with this subject. The preamble of an Act of Parliament may not have so much authority in the capacity of historical guide as has sometimes been thought; but it undoubtedly informs us what were the motives which Parliament thought fit publicly to own for the passing of the Act, if not those that were really entertained. Accordingly, it is agreeable to see that the preamble of this Act, following its predecessors, bases the need of legislation upon the obstruction to cultivation and the productive employment of labour which commons offer, as well as upon the benefits that will flow to the respective owners and parties interested from inclosing them. The public weal is here respected as well as private rights, and it is evidently not for the purpose of benefiting the lord at the expense of his tenants and fellow-countrymen that the Act is passed. Its first provisions relate to the appointment by her

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<sup>p</sup> It may be noticed also that by the 20th section of this Act, encroachments made within twenty years are to be deemed part of the land to be allotted.

Majesty's principal Secretaries of State of any two fit persons, who, together with the first Commissioner of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings for the time being, are to be the commissioners for carrying the Act into execution under the style of "The Inclosure Commissioners for England and Wales." These commissioners are to make annual reports to one of the principal Secretaries of State, specifying the applications which have been made to them under the provisions of the Act, and the several cases in which they have authorised inclosures, and the grounds on which they may have withheld their consent, and also the cases on which they shall be of opinion that proposed inclosures, which may not be made without the direction of Parliament, would be expedient.

In this report all proposed inclosures relating to lands within *fifteen* miles of London, and within certain distances of towns of 10,000 or more inhabitants, are to be separately distinguished, and their expediency proved by special reasons. The greater part of the remainder of the Act is, as in former cases, taken up with the details of the mode of procedure in any case of inclosure, but there are certain sections of a more general nature, which are important. In the first place, by sec. 11 the lands subject to be inclosed under the Act are defined to be:—(1) "All lands subject to any rights of common whatsoever;" (2) "All gated and stinted pastures;" (3) "All land held, occupied, or used in common;" (4) "All land in which the property or right of or to the vesture or verbage, or any part thereof, . . . or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil;" and (5) "All lot meadows and other lands, the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise." Here we see that waste lands of manors *are* included. But by the next section (sec. 12) it is provided, "that no waste land of any manor on which the tenants of such manor have rights of common, nor any land whatsoever subject to rights of common which may be exercised at all times of every year, for cattle *levant* and *couchant* upon other land, or to any rights of common which may be exercised at all times of every year, and which shall not be limited by

number or stints, shall be inclosed under this Act without the previous authority of Parliament in each particular case." Some check is thus put upon inclosing, for the protection of all parties interested. But by the 14th sec. a still more important restraint is imposed. This section provides that no lands situate within fifteen miles of London, or within certain distances of any other cities or towns of 10,000 inhabitants and upwards, shall be subject to be inclosed under the Act without the previous authority of Parliament in each particular case. The Act then provides (sec. 15) that no village green shall be inclosed, and (sec. 30) "that in the provisional order of the commissioners concerning the inclosure of any waste land of any manor on which the tenants have right of common," or of any other such land as is described in sec. 12, it shall be lawful for the commissioners to require and to specify as one of the terms and conditions of such inclosure, the appropriation of an allotment for the purposes of exercise and recreation for the inhabitants of the neighbourhood, not in any case exceeding ten acres or less than four; and if the commissioners do not require such appropriation, they shall in their annual general report state the grounds on which they shall have abstained from such requisition. These provisions show that there was a desire on the part of the Legislature, when they passed this Act, to protect the inhabitants of towns and the public generally in the enjoyment of those privileges which they have acquired by long usage, if not by other legal title, over the wastes of manors and other open spaces.

Further provisions of the Act which it is necessary to notice are, that by the 25th and 27th sections no application for inclosure shall be attended to, unless made by persons representing one-third in value of the interests in the lands therein proposed to be inclosed, and no inclosure shall be commenced, or certified to be expedient, unless persons representing two-thirds in value of the interests in such lands shall consent to the inclosure; and where freemen, burgesses, or inhabitant householders of any city, borough, or town are entitled to rights of common or other interests in the land proposed to be inclosed, the consent of two-thirds in number of these interested parties shall be necessary before an inclosure can be proceeded with.

By the 29th sec. of the Act it is in the same spirit provided, "that when the land to which such application shall relate shall be the waste of any manor, or land within any manor, to the soil of which the lord of such manor shall be entitled in right of his manor," then, where there is only one person interested in such manor, the commissioners shall not proceed with the inclosure or certify its expediency without first obtaining his consent, and where there are more than one person interested in such manor, shall likewise refrain, "in case such persons or the majority of such persons in respect of interest signify their dissent within the time limited by the commissioners."

This Act follows its predecessor, the 6 and 7 William IV. c. 115, in declaring that any encroachments and inclosures which have been made within twenty years (other than such as are made legally or by custom) shall form part of the lands to be allotted. That regard, too, for the public benefit which we have found indicated by so many provisions of this Act, is clearly avowed in the 27th sec., where it is stated, incidentally, that the commissioners in deciding upon the expediency of making any inclosure shall have regard "as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed, or any part thereof, shall be situate, as to the advantage of the proprietors of the land to which such application shall relate." This distinct avowment and the various beneficial provisions I have noticed, insufficient though the latter are in their practical working, plainly indicate the spirit in which the Act was framed, and give grounds for hoping that more effectual means to the same end will, if called for by the course of events, find favour with our representatives.

The above important Act has been extended and amended in points of detail by numerous Acts passed almost annually since 1845, of which it is only necessary for our present purposes to notice the following provisions. By the statute 14 and 15 Vic. c. 53, the Tithe Commissioners were put in the place of the Inclosure Commissioners and the Copyhold Commissioners, the three commissions being thus united in the same body, which nevertheless preserves three distinct styles to apply to the different matters with which it deals. A more important change

is contained in the first section of the Act of 15 and 16 Vic. c. 79, which provides that no lands are to be inclosed without the previous authority of Parliament, which it was only necessary to obtain previously in the case of certain lands specially mentioned in the General Inclosure Act of 1845. Section 14 of this same Act also provides that village greens and allotments for exercise and recreation shall not in certain cases be fenced. These greens and allotments are further protected by the 12th section of the 20th and 21st Vic. c. 31, which enacts that any person leading or driving cattle or other animals thereon, or wilfully laying any manure, soil, ashes, or rubbish, or other matter or thing, or committing other nuisance thereon, shall be liable to summary conviction and a penalty not exceeding forty shillings, besides damages. These are all provisions of minor importance, no material alteration in the general law of inclosures having been made since the Act of 1845.

An important Act, however, relating to commons within the Metropolitan police district was passed in the session of Parliament of 1866. By this Act (29 and 30 Vic. c. 122), which is entitled "An Act to make Provision for the Improvement, Protection, and Management of Commons near the Metropolis," it is provided (sec. 5) that after the passing of the Act the Inclosure Commissioners "shall not entertain an application for the inclosure of a metropolitan common or any part thereof," though any provisional order, already confirmed by Act of Parliament, shall be carried out. Instead of inclosing in the old way, the following method is established: "A scheme for the establishment of local management with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common, and to the making of by-laws and regulations for the prevention of nuisances and the preservation of order thereon, may be made under this Act on a memorial in that behalf presented to the commissioners by the lord of the manor, or by any commoners, or by the local authority" (which is defined in the first schedule to the Act), "or in case of a common extending into the districts of two or more of the bodies described in the first schedule to this Act, then by any one or more of such bodies." This scheme is to be drawn by the commissioners, if on inquiry they should think it would be useful, and after being thoroughly ventilated



by the public opinion of the neighbourhood, to be ascertained if proper by an assistant commissioner, shall be settled and approved by them, and laid before Parliament for confirmation by an Act.

If any bill confirming a scheme is opposed in Parliament by petition it may be referred to a Select Committee, in the same way as a private bill. Provisions for compensation of all persons whose interests are injured by the scheme are to be contained in it.

Such is a general outline of this Act, upon which we shall have occasion hereafter to comment. It has been made on the recommendation of the Open Spaces Committee, who made two reports in April and June, 1865.

Inclosures under the modern Acts are not so extensive as their promoters anticipated. In the district comprised within a radius of fifteen miles round London, there yet remain 13,000 acres of uninclosed ground, and, if we go out ten miles further, that quantity is increased to 38,000 acres.<sup>a</sup> In agricultural districts alone have the Acts been widely used, and in those districts their operation is not hurtful.

It appears, then, upon a review of the recent legislation on this subject, that the right of the lord of the manor to approve or inclose the waste lands of his manor, as against his tenants or other persons claiming right of common in them, is unaffected by the Inclosure Acts of modern times.<sup>b</sup> Those Acts do not look at inclosure from the lords' point of view, but from that of the public generally; and while protecting the interests of all parties in the lands to be inclosed, have no design of placing more power in the hands of any. The lord who wishes to inclose the waste lands of his manor and make as much profit out of them as possible, has, therefore, under the existing law two distinct courses open to him. He may apply to the Inclosure Commissioners, who, if the common is not in the Metropolitan police district, will send down an assistant-commissioner, and upon his reporting that two-thirds of the persons interested

<sup>a</sup> See Mr. Cole's Pamphlet, referred to on p. 340, note <sup>m</sup>.

<sup>b</sup> The provision for leasing of the 13 Geo. III. c. 81, s. 5, mentioned above,

is no exception to this remark, as it is for the benefit of the commoners as much as for that of the lord.

as commoners or otherwise in the wastes consent to the inclosure, will, if they think it expedient on general grounds, make a provisional order allotting to the lord about a fifteenth or a twelfth of the wastes as compensation for his rights, and apply to Parliament for an Act sanctioning the inclosure. If the common is a metropolitan one, the commissioners will consider, upon such application, whether a scheme for its management will be advisable, and, if such a one is carried out, will compensate the lord for his rights (when they are affected, which, however, need not be the case), probably after the same proportions as those already mentioned. This course does not (alas! too often) sufficiently answer the lord's purposes of aggrandisement to meet with much favour from him. The other course that is open to him is to rely upon the old statute of Merton and those which explain and confirm it.

This is the course which has been most warmly embraced of late, but, as we have seen, it is a very precarious one. Let us for a moment examine the point more closely.

In order that the lord may legally approve under this statute, it is necessary that he should be in a position to prove, if required to do so, that he has left sufficient common of pasture for all his tenants and all others who have rights of common in his wastes. If he can prove this the approvement is good as against his own freehold tenants who have a right of common appendant to their tenements, and (it would seem by the statute of Westminster the Second) against other commoners who are *vicini* or neighbours, the tenants of other manors, and who have common as appurtenant to their tenements; but it is not good against any freeholders of the manor who have a right of common appurtenant to their lands or houses within the manor under express grant from the lord,\* or against any person having a right of common in gross, which must always be by grant or prescription which presupposes a grant. It is not good, moreover, against anyone having a right of common of turbary, and it is not good in itself against the copyholders of the manor who have common-rights. Thus it is evident that in very few cases can approvement of common by the statute of Merton be

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\* Such grant is to be proved by production of deed or long usage.

legally accomplished unless the number of persons interested in the common-rights has dwindled down to nothing. In this last case we shall endeavour to prove, in the concluding portion of this Essay, that approvement should not be undertaken without a due regard to the public benefit.

Before concluding this sketch of the law which at present governs the inclosure and approvement of waste lands and open fields, it may be well to give a moment's more direct attention to the position of copyholders in respect of commons. It has been already observed that their rights of common are founded entirely on the customs of particular manors. They have never had any title to such rights at the Common Law, just as they have never had any such title to their houses and lands held by copy of court-roll. But in the matter of common-rights, as in more important ones, their position has become practically almost the same as that of freeholders. In nearly every manor there has been, from time "whereof the memory of man runneth not to the contrary," a custom that the copyhold tenants should have the usual rights of common, and especially that of common of pasture in the lord's wastes. But inasmuch as these rights were not obtained of the Common Law, so the curtailments imposed by that law did not affect the copyholders. Whether or not the lord could, previous to the statute of Merton, inclose against his freeholders by the Common Law, it is quite certain that he could not by such an authority inclose against his copyholders. And when the statute of Merton was passed, the case of freeholders was alone considered, so that under that statute the lord has no power to approve against his copyholders. By the statute of Westminster the Second it would seem indeed as if the lord might approve against copyholders of other manors having pasture in his wastes as appurtenant to their tenements, and not by special feoffment or grant, if any such could exist; but there is nothing in this Act authorising him to inclose against his own copyhold tenants. Neither was their case dealt with by the Act of Edward VI. The Inclosure Acts, proceeding on a totally different principle, affect copyholders equally with freeholders; but by the Common and Statute Law the lord has no power to approve against the former. The lord's power in this case is derived from the same source as the commoners'

rights—*custom*. In order that he may approve, he must establish a custom in the manor to do so with the consent of the homage, *i. e.* the copyholders assembled in his court. On some occasions a custom has been asserted by which the lord could approve without such consent, but it has been pronounced bad. In *Badger v. Ford*,<sup>1</sup> a case heard by Chief-Justice Abbott of the King's Bench in 1819, a custom for the lord to grant leases of the waste at his own discretion without restriction was pleaded, but was held bad by that judge, who said it was too much to suppose a reservation of a power by the lord at the time of the original grant, *the effect of which would be to enable him to annihilate the right of common altogether*. Such a custom could not exist.

Again, in *Arlett v. Ellis*,<sup>2</sup> a case argued before the King's Bench in 1827, a custom for the lord to inclose the wastes of the manor without limit or restriction was pleaded but was again held bad, Justice Bayley, in giving judgment, saying, that a right (founded upon a custom in that particular manor) in the lord to abridge the rights of the commoners and to confer in severalty upon any person from time to time such portions of the waste as he should think fit, was a right utterly inconsistent with an existing right of common, for the lord might by degrees inclose the whole of the waste, and so annihilate the right of the commoners. He distinguished this from another case in which the grant of the soil was made by the lord *with the consent of the homage*, signifying that such a grant was good, but not a grant at the mere discretion of the lord. It is evident, then, from these cases, that in order lawfully to approve as against his copyholders, the lord must obtain their consent (whether unanimous or not is not decided, but they must have been fairly summoned to the court),<sup>3</sup> and must show a custom authorising him to approve with such consent. Since, then, it is a rare thing to find a manor without copyholders, these conditions are gene-

<sup>1</sup> 3 B. and Ald. 153.

<sup>2</sup> 7 B. and C. 346.

<sup>3</sup> By the 4 and 5 Vict. c. 35, s. 91 (the Act abolishing the formal holding of Customary Courts), it is specially provided, that where by the custom of any

manor, the lord is authorised, with the consent of the homage, to grant any common or waste lands of the manor, the court must be duly summoned and holden as before the Act.

rally necessary to render lawful any approvement which is attempted under the statute of Merton.

Having thus traced the origin of common-rights, and of the relation of lord of the manor and tenant out of which they arose, and reviewed the legislation which has had for its object to reduce parts of the ancient manorial wastes to private fields, we are now in a condition to determine what is the duty of any real or reputed lords of manors towards their tenants and others having rights of common on their wastes, and towards the public in general, and also to suggest what, if any, should be the changes in the existing law on the subject of approvement and inclosure in order to meet the wants of the present day.

The true relation of a lord of the manor to his tenants, where the manor has all the characteristics of the original institution, we have already seen. His relation to his freehold tenants—tenants by free and common socage (for whatever tenants by knight's service he originally had were made socage tenants by the statute 12 Car. II. c. 24)—is one of mutual fidelity, they rendering to him all the services incident to their tenure, and he supporting them in the enjoyment of their tenements and all appurtenances belonging thereto. His relation to his copyhold tenants—tenants by villenage—is one regulated entirely by custom, custom which has in most cases placed the copyholder in as good a position as the freeholder.

This is the true situation of a lord of a manor subsisting in its entirety. It is manifest that any encroachments on the common-rights of his tenants should be most repugnant to the feelings of such a lord.

But the case cannot be stated thus simply. As a fact, there are hardly any fully-constituted manors to be found in England. In order to ascertain the duties of the lord under existing circumstances, we must consider the changes which have befallen manors in recent times. Now, the first serious modification in their ultimate character was made so long ago as the reign of Edward I. By the statute of *Quia emptores terrarum*,<sup>7</sup> which has been already noticed, the practice of sub-infeudation was forbidden. Freemen were allowed to sell at their own pleasure

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<sup>7</sup> 18 Edward I. c. 1.

their lands or tenements, but so that the feoffee should hold "the same lands or tenements of the same chief lord of the fee and by the same services and customs as his feoffor held them before." Therefore, after the passing of this statute, it was impossible for any one to create a manor, and it was even impossible for any lord of any existing manor to create any one new tenure. If he enfeoffed any one of part of his lands the feoffee would not be his tenant but the tenant of his superior lord. The only way in which he could acquire new tenants would be by the sale by some of his original tenants of part of their lands. The purchasers in these cases would hold of him, and if right of common of pasture was appendant to the lands, part of which was sold, that right would be enjoyed by the new as well as by the old tenant. Rights of common might also be created by the grant of the lord, as appurtenant to lands which he himself sold, and would thus vest not in his tenants but in those of his lord.

The second alteration in the constitution of manors was made by the statute of 12 Car. II. c. 24, which converted all tenures by knight's service into tenures by free and common socage, and abolished many of the feudal incidents to the latter tenures.

By the operation of this Act the only incidents which can now attach upon freehold tenements in favour of the lord of the manor are suit of court, fealty, relief, escheat, and forfeiture. Even these are not of any importance. For relief in socage tenure was one year's rent of the lands held, consequently it is only due where lands in fee simple are held by rent. Again, an estate seldom comes to the lord now by escheat or forfeiture, for though upon the death of a bastard in possession intestate, or of a person convicted of murder, or abetting, procuring, or counselling the same, his lands and tenements escheat to his immediately superior lord, yet the difficulty of proving who is the immediate lord generally causes the estate to go to the Crown, as the original proprietor of all the lands in the kingdom.\* In addition to these incidents, the ancient services (if

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\* By a recent statute, 18 and 14 Viet. | any trust or by way of mortgage are  
c. 60, lands vested in any person upon | exempted from escheat.

any) upon which any estate was granted are still due, but these seem in nearly every case to have been commuted into a fixed rent, which, by the depreciation of money in modern times, has become exceedingly small, and is now, when existing, called a quit-rent.

Such is the actual position of the freehold tenant with regard to his lord, when it can be distinctly proved that he has one. His obligations, it will be seen, are extremely light, while on the other hand, homage being abolished and the oath of fealty seldom or never exacted, the lord is not bound in the distinct and solemn manner of ancient times to preserve the tenant in his rights, though undoubtedly the moral obligation remains.

But it is probable that there are few cases in which a manor, even in this truncated form, really exists. It will be remembered that the *causa sine qua non* of a manor is declared by Lord Coke to be a court-baron.<sup>a</sup> Now such a court, according to the same authority, cannot subsist without two suitors *ad minimum*, i.e. two freeholders holding of the manor subject to escheat. For the court-baron, as we have shown, is quite distinct from the customary court of the manor, in which the suitors are copyholders, and the lord or the steward the judge. Consequently, if there are not two such freeholders as above described belonging to a manor, the manor is declared by Lord Coke no longer to exist. This opinion was reiterated in modern times<sup>b</sup> by Lord Kenyon, who, in the case of *Glover v. Lane*,<sup>c</sup> expressly declared that "to constitute a manor it is necessary not only that there should be two freeholders within the manor, but two freeholders holding of the manor subject to escheat." But in order to prove his claim to two such freeholders, the lord must show that their ancestors or predecessors in title were tenants of the manor at a date anterior to the 18th year of Edward I., when the statute of *Quia Emptores* was passed. The difficulty of tracing an unbroken title through so long a period is evidently sufficient to make the cases in which such freeholders can be claimed by a manor extremely rare. It appeared, as we have before stated, that in 1859 five courts-baron retained some signs of vitality. It may therefore be a grave question, whether there are more than

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<sup>a</sup> Vide *supra*, pp. 315, 320, and App. (C).    <sup>b</sup> Nov. 17, 1789.    <sup>c</sup> 3 T. R. 447.

five manors really existing in England. Those who claim to be lords of manors are in reality for the most part not such. They are merely persons who have a seigniorship over certain copyhold lands and over certain waste lands. Their seigniorship over their copyholders is easily proved, for the incidents of the estate are so numerous and favourable to the lord that they have never been allowed to lapse, and the holding is distinctly traced through all times which can be remembered. A copyholder must hold of some lord of the manor, in whom the fee-simple of the estate is vested and at whose will merely he is tenant. The fee-simple of a freeholder's estate, on the contrary, is vested in himself. Hence the relation of the reputed lord to his copyholder is clearly defined; and as far as respects copyhold estates, many manors still exist.

The intention of the Legislature not in any way to prejudice the quasi-lord's right over *wastes* by the extinction of the manor, is plainly shown in the phrase "real or *reputed* lords of manors," which is generally used in those clauses of Inclosure Acts which affect manorial rights. Putting aside then any idea of impeaching the lord's *ownership of the soil* of what are or were formerly the waste lands of his manor, we may endeavour to determine what his duties are with respect to them under the changed circumstances we have described. Now it is possible to conceive that a manorial lord might consider the changes that have taken place all in favour of his doing what he pleased with his wastes. The rents and services of his freehold tenants have been reduced to nothing, and those of his copyholders even, have, through the depreciation in the value of money and the increased opulence of persons who are not landowners, become comparatively insignificant. Is he then, it might be said, bound to pay such attention to the welfare of his tenants as will prevent him from developing the resources of the lands which still remain in his own hands? May he not attempt to make up in one way what he has lost in another? Such reasoning as this can be imagined. It is, however, shallow and unfair. The change that has come over our system of landed property is not to be measured merely by the abolition or abandonment of certain old feudal services, certain payments of rent and ploughings of land. It is a change in the whole internal



character of the system. Originally the lord and his tenant were bound to protect each other's interests, not merely within the limits of strict law, but so far as lay in their power. Now, the relation of lord to tenant is strictly defined by law. Neither is bound to do more for the other than he can be compelled to do before a legal tribunal. Neither is expected to feel any more interest in the other than he ordinarily feels for a fellow-countryman. But the positive gain resulting from this change is chiefly on the side of the lord; or rather we should say, that benefit to each, which was embodied in the old system and has vanished, was more important to the tenant than to the lord. The lord's protection was of as much more consequence than the tenant's support as the former was more powerful than the latter. The services of the tenant were a return for this protection, and, considered in each individual case, a small one. When with the progress of order and gentleness of manners the lord's protection was no longer needed, the tenant's services met with no return, and so were gradually allowed to become extinct. The withdrawal of protection from one side and services from the other was a fair cancelling, and did not prejudice the position of either party. But if the tenant were to have those privileges which maintained him in his calling, his rights of common, infringed upon as well, the change would be much for the worse as regards him.

Again, there is another view of the matter. If the services which freehold tenants of manors paid to their lords are now inoperative, so also are those which lords paid to their superiors. The abolition of most feudal incidents and the practical neglect of those remaining have been a much greater boon to the powerful lord than to the small tenant. Few tenants to whom rights of common have been important, held by knight's service, most by the comparatively easy socage tenure. The burdens of this tenure were always light, but the burdens of that military tenure by which lords of manors held were grievous in the extreme. These burdens were abolished by the notable Act of Charles II., and the great men of the kingdom were thus placed in that favourable condition in these respects which they so much envied in their poorer tenants. Surely when the course of law has dealt thus beneficently with the lords, allowing them to

retain their dignity and possessions without the attendant burdens, they cannot attempt to abridge the rights of their tenants on the ground that they, too, hold more freely than formerly.

It seems plain, then, that merely upon the give and take principle it is the duty of lords of manors carefully to preserve and respect the rights of any freehold (and, *à fortiori*, of any copyhold) tenants they may have over the waste lands of which they claim the soil.

But two questions here arise. In the first place, what are the duties of those who really have no manors, having lost their freehold tenants? Secondly, suppose the commoners of a waste have become very few and insignificant, requiring little pasture to feed their beasts, and few "turves" to feed their fires, is the real or reputed lord then justified in approving, paying no attention to the wants of the public at large, to the benefits derived from the common as an open space? In answer to the first question it may be said that those quasi-lords, who have no freehold tenants, have still copyhold tenants, and owe these the same duties with respect to their wastes as in the best days of the manor, the customs of the manor still holding good. Except in this particular of having copyhold tenants, they become mere owners of soil over which rights of common are exercised. Their position is then the same as that of any owner of soil who has granted rights of common to others therein. This indeed is the position of any lord of the manor with regard to those to whom by special grant (proved by deed or thirty years' uninterrupted usage) he has given rights of common over his manor; and it has moreover been stated that it is as owner of the soil, not as lord, that the lord has a right to approve under the statute of Merton.<sup>d</sup> Against any thus claiming by grant, the lord, or the owner of the soil, has no power of approving at all. If he has granted common over his whole wastes, he must leave them all open to such grantees, if they wish it. This is his plain duty, as founded upon his covenant, and it may be enforced by law. If, however, any quasi-lords of manors have no grantees exercising rights of common, the question then becomes identical with the second we propounded :

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<sup>d</sup> *Arlett v. Ellis*, 7 B. and C. 446.

is it their duty, supposing they can do it legally, *i.e.* with consent of the homage, to approve such parts of the common as are not wanted by the copyholders, without reference to considerations of public utility?

The great question which is now to be answered is, have the public any claim upon the owners of the soil of waste lands and open spaces? or, in another form, has the lord such absolute property in his waste lands that he is irresponsible to the general public, the nation at large, for the use he makes of them? In either form this question may be decided in favour of the public.

But the reasons for this decision, and the sense in which it must be understood, require detailed explanation.

It has been stated as a doctrine of English law, that the public have no right to use commons, forests, and open spaces for purposes of recreation. But the doctrine is apparently maintained rather on the absence of any definite legislation or judicial decision than on sound authority, and is moreover a doctrine about which there is much difference of opinion amongst lawyers. The fact is, that the question is one which, till quite recently, was never likely to occur at law. There are numberless cases reported between a lord and his commoners, or persons who pretended to be commoners, but these cases always concerned some right which could be valued in money, such as the feeding of beasts or the cutting of turf. The lord, if he could have done so successfully, never thought it worth his while to go to law with a man for simply walking upon ground which was confessedly waste. Consequently, with the exception of one very old case,\* there seems to be no authority whatever going directly to the point.

But if there is this haziness about the strictly legal aspect of the question, the rational and moral aspects are clear enough. For let us glance a moment at first principles. The only reasonable foundation for property in land at all is, that the soil must be improved by labour and expenditure in order to make it fruitful, and therefore those who improve it are entitled to a

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\* 5 Vin. Abr. 35. The only ground upon which the public have any express right to enter for the purposes of recreation, is that set apart under the provisions of the Inclosure Acts already mentioned, or vested in trustees

for those purposes, under the Act of 22 Vict. c. 27, or purchased by the ratepayers of a parish under the 23 and 24 Vict. c. 30. These exceptions evidently do not affect the position advanced in the text.

superior interest in it over others. Trespass is punishable at law, only because it tends to the damage and annoyance of those who are improving the land. When no damage can be done, and the owner's legitimate privacy cannot be intruded upon by an entry upon the lands, there is no longer any reason for considering such entry to be a trespass.

It is plain then that no owner of wastes can in his conscience feel entitled to shut the public out of his lands, unless it is for purposes of cultivation or improvement. We thus see already that the waste owner is under *some* moral obligations to the public. But we may ask further, is he entitled to shut them out even for purposes of cultivation or improvement, when it is not clear that the results attained will be on the whole beneficial to the nation? On the highest principles, evidently not, for no private person is morally justified in self-aggrandisement at the expense of large numbers of his fellow-creatures. But apart from this general consideration, the position of the landowner is peculiar. Land is not made by any man, but exists in a limited quantity. Any one who has power over a portion of it has a share in a monopoly; is enjoying something which cannot be increased indefinitely, and out of the enjoyment of which he is consequently keeping some one else. This share of a limited commodity having been conferred upon him, it must in reason have been conferred in trust to be used for the benefit of the remainder of the community. If this idea was not present at the time of the original gift, it must have arisen as a just appreciation of the duties of man to man became prevalent. But something very like this idea did exist in England when the original grants of land were made. The old Saxon grants, which were of an allodial nature, yet imposed upon the recipient the *trinoda, necessitas*, defending the country, and repairing roads and bridges. These were the duties to be rendered to the community in return for the sole enjoyment of a portion of its property. The duties accompanying the feudal grants of the Normans were of a more personal nature, but were at the same time more numerous and more exactly defined. The king being considered as the owner of all the forfeited property of the Saxons, granted it out to his followers on condition of their doing certain services to him. But as he, more than any other

man or body of men, impersonated the nation generally, it is no essential change in the character of the compact to consider the land conferred by the *nation* on condition of certain services being performed to the *nation*. At all events, it remains a fact, that some duties were in the earliest days of our island commonwealth considered to attach to the ownership of land. It will therefore be doing no violence to either the philosophical or historical view of landed property, to consider the owner of waste lands to be under such obligations to the public to deal with his lands in the way most to their advantage, as may, if expedient, be sanctioned by laws.

This conclusion is strengthened by some considerations applying particularly to the case of waste lands.

The number of those having rights of common over such lands has undoubtedly practically diminished in modern times. We say practically, because it is probable that there are many people really entitled to rights of common who never in any way claim such rights. These people, it is obvious, as long as they remain quiescent, have no practical influence upon the dealings with commons. The chief reason for their neglect of their common-rights is that mentioned by Mr. Cole, in the pamphlet before referred to,<sup>f</sup> *viz.* that it has been found more profitable to feed cattle on inclosed and improved land, the additional price secured exceeding the rent of such land. Recent improvements in agriculture have shown that to turn beasts out upon an open common, with the chance of their catching diseases, and not finding sufficient or sufficiently good pasture, is not so economical and satisfactory a proceeding as feeding and tending them with more care, though at a slightly greater expense.

In so far as this cause has been operating, and commoners have only suspended not abandoned their rights, it seems that the lord's position is in no way altered even in law.<sup>g</sup>

But apart from this neglect of rights, it seems evident that the number of commoners actually existing is much smaller

<sup>f</sup> 'Our Commons and Open Spaces,' p. 20.

<sup>g</sup> The old authorities, Bracton and Britton, say that long neglect of user will operate to defeat a right of common, since it is gained only by long suffer-

ance. Modern authorities, however, seem to incline the other way. See Woolrych on Commons, p. 154, and Petersdorff's 'Ab. of C.s.s.' tit. Common. (VI. A, B, and C.)

than formerly, especially in the neighbourhood of large towns. The principal cause of this diminution will be readily thought of. All over the country small farms have, during several centuries, been disappearing. Large landowners have been continually buying up the holdings of their smaller neighbours, who perhaps in times of adversity, or perhaps at particular crises in the family history, have found it advantageous to sell. The system of tenant-farming, which is more prevalent in England than in any other country, has conduced to this amassing of large tracts of land in the hands of individuals. It has been found, at least in certain stages of society, that the large farmer competes at an advantage, when farming for a profit, with the small one.

The accumulation of capital has enabled farmers to lease large tracts of ground, and the increase of population, by augmenting the demand for corn, has so advanced rents, that landholders have hastened to buy up as much additional land as possible.

Other occupations than that of farming have attracted the small landowner, the descendant of the old socage tenant. He has taken to some business in a town, or (when a youth) entered the army, or gone to sea. As society advances in material prosperity, new wants are felt, and the division of labour is constantly extended. This division of labour alone tends strongly to the attraction of a small farming proprietary into other industrial channels. Perhaps too in England the civil wars of the fifteenth and seventeenth centuries contributed to bring about this result. All times of disorder and want must press heavily upon the small freeholder, with perhaps little accumulated capital to carry him over a rainy day. In the fifteenth century there was a strong movement towards the conversion of small arable holdings into large grazing farms. This movement was adverse to the existence of small freeholders, or small farmers of any description. Whether arising from these or other causes, it is an undoubted fact, that the race of yeomen—small freeholders farming their own lands, or small tenant farmers—has become well-nigh extinct in England.<sup>b</sup> The consequence is obvious. Rights of

<sup>b</sup> The only part of England where they still exist is the counties of Cumberland and Westmoreland, where the "statesmen" have all the characteristics of the old yeomen.

See Wordsworth's description of the scenery of the Lakes in the North of England. 3rd edition, pp. 50-53, and 63-65.

common, formerly possessed by many as appendant or appurtenant to their lands, have fallen together into the hands of a few individuals, who at the same time, from the character of their farming, have little occasion to exercise such rights. The right of feeding cattle, and cutting turf and wood, though very important to a small farmer whose land was chiefly arable, is almost worthless to a man who has sufficient ground of his own to supply him with all these requisites as mere incidents of his tillage.

There is one other reason for the diminution of common-rights, which applies to those wastes which are in the neighbourhood of large towns. These rights, we have shown, generally attach to lands which require the labour of beasts. The oldest kind of common-right attached only to arable lands. That which was next recognised was still connected with land of some sort. So late as the time of Edward I. no right of common existing unattached to a "free tenement," was recognised.<sup>1</sup> The most usual limit to common of pasture was, that only such beasts could be put in as were *levant et couchant* on the lands of the claimant, *i. e.* maintainable on his lands during the winter, when no crops were on the ground. It has also been distinctly held that common could not be claimed as appurtenant to a house or cottage which had no curtilage or lands surrounding it. But the extension of a large town inevitably destroys arable land, and land which could maintain animals in the winter, converting such land into building grounds; streets spring up where crops used to grow. Thus the title to rights of common is taken away, and many are deprived of such rights by a process as natural, as it is in most cases, on the whole, profitable to those who are, in this respect, losers.

From these two chief causes, then, the conversion of small farms into great ones, and the growth of large towns, the number of those claiming rights over waste lands is in most cases greatly diminished. Now, ought the lord to take advantage of this lapse of common-rights to his own aggrandisement, or ought he to consider that the lightening of his duties towards those who were once his tenants makes his obligations to the public so

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<sup>1</sup> Vide *supra*, p. 331.

much the heavier? We think the latter is the more correct view of the subject. The lord has not bought up his commoners' rights, he has not suffered any loss or exercised any self-denial in order to get rid of those rights. Then what claim has he to profit personally by their lapse?

If, indeed, he has himself purchased the holdings of some of his small tenants, then the rights of common may be considered part of that for which he paid, and he is entitled to profit by their vesting in him, though it is not clear that he is entitled to profit in a way affecting the public altogether differently from that in which his commoners took their profit. But except inasmuch as he himself has been the purchaser of the commoners' tenements, or of any rights of common in gross previously granted by himself or his predecessors in title, he evidently has no right whatever to profit by any extinction, abandonment, or neglect of rights, which has been occasioned simply by the general progress of the nation. So far as personal benefits were derived by those having these rights, they may be considered to have fallen to the ground. No individual stands in the place of those who possessed them. Thus far indeed the lord may indirectly profit, for he can feed more cattle on the common than formerly, leaving sufficient for his remaining commoners. But so far as the commoners were unintentionally instruments in the hands of the public for the preservation of open spaces, their rights should be considered as transferred to the public itself.

This view of the case is particularly applicable to the lapse of rights through the extension of towns. In the place of comparatively few commoners living round or near the waste land, have sprung up numberless houses and a teeming population. Surely the rights of the few commoners may fairly be considered to have vested morally in that teeming population, the growth of which has occasioned them legally to lapse.

The second consideration affecting the character of waste lands and the public claims upon them, is, that such tracts of country originally formed the least important parts of large territories which gave to their owners, not simply rights of property, such as now exist, but powers of jurisdiction and of general paternal supervision. The earlier portions of this Essay



have abundantly proved the existence of such powers. Through their possession, the lord of the manor was constituted a public officer, and, in a special way, a trustee for the nation (and not for his commoners only), of all those parts of his land which he did not actually use himself. Wastes would never have been given to a landowner of the modern description. It follows, that, when lords of manors, in spirit and almost in every detail, have become nothing more than modern landowners, they are clearly not entitled to take a greater beneficial interest in such wastes than they had of yore. On the other hand, they are to be considered as persons who, having had certain means given them to accomplish certain ends, have ceased to fulfil those ends, and are, therefore, no longer justified in enjoying the means.

Whether, then, we look at the position of an owner of waste land simply as that of a landowner, or with reference to the particular nature and incidents of the soil he possesses, we inevitably come to the conclusion that he is morally (and, if we look to the first principles of our law, then also legally) bound to consider the interests of the public in dealing with his wastes. In the depths of the country, where population is small and access to open spaces easy, he may be doing good by inclosing parts of wastes, and so increasing the productiveness of the earth. In the vicinity of large towns, where dense masses of people are congregated, and pure air and beautiful sights are a luxury seldom obtained by the majority, he is, without question, doing incalculable harm—incalculable in its moral as well as its physical effects—if he shuts up any of the few open spaces that remain, and drives the smoke-dried citizen to take longer and more expensive journeys before he can rest himself on the green sward of untutored nature. He is morally bound to bear these considerations in mind and act accordingly ; and it is the duty of the Legislature, whose business it is to *make* the unconscientious do what the conscientious do willingly, to enforce (if necessary) such considerations by legal sanctions. Above all, an owner of waste land is bound not to outstep the law in putting in force, with a high hand, an obsolete Act of Parliament, which can only be legally used under a certain peculiar arrangement of circumstances. It is clearly the duty of the Legislature,

if it appears that such an Act is needless and vexatious in its operation, effectually to prevent its becoming a nuisance by enacting its repeal.

The leading conclusions that have been arrived at in the foregoing pages may be briefly stated in the following manner.

Rights of common were, in their original character, incidents of manors, which were themselves a feature of the feudal system. They arose in connection with the agricultural economy of an early age. It was found necessary, for the maintenance of the small freehold tenants of a manor in their occupation, and to enable them to render their fixed services to the lord, to allow them to pasture the cattle which ploughed and manured their land upon that portion of the manor which was not cultivated or used for ornamental purposes, and which was called the lord's waste. This privilege was so obviously necessary from the first, that it was considered incident to a freehold tenure of common right. It was, at a very early period, also granted to the villeins or copyholders of nearly every manor, who thus became entitled to it by special custom. Other rights of common, of a similar nature, soon also grew up—those of turbary, piscary, and estovers—all having for their object the welfare of the small agricultural tenants. The relation existing between the lord of the manor and his freehold tenant at this time was one of an essentially feudal character. The lord granted protection to his tenant in return for fidelity and support. Interest, chivalric sentiment, morality, and religion, all conspired to render the bond as close as possible.

To his villein, afterwards his customary tenant or copyholder, the lord was not similarly related. Originally the villein was wholly in his power. But with the progress of enlightenment his position approximated to that of the freeholder; and most of the rights which were enjoyed by the latter, on the basis of the Common and Statute Law of the land, were enjoyed by the former in consideration of special customs, which finally obtained the sanction of the law.

Corresponding to the two kinds of manorial tenants were the lord's two courts, the court-baron and the customary court.

The court-baron was the court of the freemen of the manor, who sat in it as judges, the steward of the manor acting as

registrar. The customary court was the court of the copy-holders, and in it the steward was judge. These courts, by bringing together the lord and his tenants, strengthened the bond which united them. That of the freemen was a standing testimony, both to the dignity of a freehold tenant and his substantial equality with his lord, and to the community of interest between the head and the component members of the manor. Such were the relative positions of those between whom rights of common originally existed.

As the nation increased in numbers and general prosperity, and the class of socage-tenants and burghers gained more influence, the feudal system became considerably modified. The change that was going on is seen in the history of common-rights, as well as of more important institutions. Rights of common are no longer found to exist exclusively between lord and tenant. Grants were made of common of pasture, to be appurtenant to tenements in a different manor. To such an extent had this change set in, that in our earliest law-books rights of common are treated as existing between an owner of soil and a claimant of common therein, and not between a lord of a manor and his tenant. These early writers bear strong testimony to two propositions; firstly, that there always was an owner of the soil in which common was claimed; secondly, that, nevertheless, rights of common were substantial rights, that could be maintained at law against aggressors. As time went on the departure of common-rights from their manorial origin became wider. In the time of James I., when perhaps the greatest authority in English law, Lord Coke, wrote, four distinct kinds of common of pasture were recognised. Common appendant, which was allowed to be the oldest of these, was the only one that referred to the relation of lord and tenant. The other three kinds were common appurtenant, common in gross, and common *pur cause de vicinage*, the latter, however, being merely an excuse for trespass.

Long before rights of common had attained this fully developed form, the estrangement which grew up between the lord and tenant, and the increasing inducements to the cultivation of land, had occasioned an Act to be passed allowing the lord to "approve" and inclose part of his common under certain

circumstances. This Act was speedily explained and extended by another, and thus modified, enabled any lord or owner of soil to inclose his wastes against any who had rights of common of pasture therein, who were not copyholders, and did not claim by grant, provided he left sufficient herbage for their beasts. These Acts were confirmed by a statute of Edward VI., but do not seem to have been very much acted upon in later times.\* Towards the close of the last century the subject of wastes and their inclosure was brought before the notice of Parliament, and upon the reports of select committees it was resolved to facilitate their reduction into cultivation. A considerable portion of waste land had already been inclosed under special Acts, but it was now decided to bring forward a general measure upon the subject. Accordingly, by the 41 Geo. III. c. 190, the present system of inclosing was in substance inaugurated. This system, which is now governed by the General Inclosure Act, 8 and 9 Victoria, c. 118, and its amendments, has no connection whatever with the old plan of approving. It is a system established solely with a view to the public good, and is no more favourable to lords of manors than to commoners. It acknowledges the value of commons as open spaces for recreation, and the danger of inclosing too much in the neighbourhood of large towns. By its latest representative, the Act of 1866, it prohibits absolutely any further inclosures (not already commenced) within the Metropolitan police district.

The system thus sanctioned has not been so widely acted upon as might have been expected. It has not been injuriously used by lords of manors and other owners of waste soil, simply because it is incapable of being put to such use. The Inclosure Commissioners are bound to take into consideration the claims of the public upon waste lands; they cannot certify an inclosure to be expedient unless they obtain the consent of persons representing two thirds in value of the interests in such lands; and when they inclose, they only allot a twelfth or a fifteenth of the waste to the lord as fair compensation for his rights. Conse-

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\* See the Appendix to the "Report from the Select Committee on the Cultivation of Waste Lands" of 1795, where it is stated that "in modern times there is scarce an instance of an improvement, as it is technically called, having taken place."

quently the mode of procedure sanctioned by the statute of Merton, which is unaffected by the Inclosure Acts, has again been resorted to by owners of waste land in a manner as recklessly regardless of public needs, as, in most cases, unlawful in respect of commoners' rights.

The number of persons having a title to rights of common has much decreased in modern times. The chief causes of this decrease are the conversion of small farms into large ones, and the growth of large towns. This state of things adds another argument to those founded upon general principles, which show what are the duties of lords or owners of wastes towards their tenants and the public. Those duties have been clearly proved. They consist in scrupulously respecting the rights of all remaining commoners, and in paying due regard to the wants of the public.

That the public have at present any legal title to waste lands for purposes of recreation is a proposition about which opinion differs. But that the owner of such lands is *morally* bound to consider their value for these purposes is obvious. It is his duty not to inclose to any great extent in the vicinity of large towns, and when he does inclose, he should adopt the equitable mode appointed by recent statutes, instead of relying upon an old law which was intended to apply to totally different circumstances. These duties of the lord or owner are so obvious and important that they may justly be enforced by law.

It now only remains to consider if anything can be done under the existing law to protect commons from inclosure, and what alterations of that law would be most likely, in default of success, to secure the desired end. Now it is evident, from the foregoing remarks, that much might be done by commoners to check aggression if they knew their rights, and how to proceed in their vindication. It is clear that wherever there are any copyholders entitled to rights of common the lord of the manor cannot approve under the statute of Merton. Copyholders of a manor being much more easy to find than freeholders, the simplest course in most cases will be to raise a strong opposition to any inclosing on the part of the copyholders. Persons who have rights of common by grant, express or implied, will also be powerful opponents to an aggressive lord. When once those to whom rights can clearly

be traced have moved in the matter, either of their own inclination or at the instigation of the outside public, the greatest difficulty will have been got rid of. The mode of procedure will of course differ in different cases, but one suggestion may be made. Any commoner whose rights are molested is clearly entitled to throw down the whole fencing or other obstruction erected. It may also be mentioned that, in many cases, the Crown has rights of forest over waste lands, as, for example, over Epping Forest, and if these rights were properly insisted on, improvements must in such places cease. Every possible step should at once be taken; and the owners of the soil, if they persist in acts of violence, should be forced before a Court of Law or Equity. This is already being done in several cases; and it may fairly be expected that commoners and the public in general will shortly find themselves in a much more secure and satisfactory position.

In the event, however, of the discovery that the existing law is not favourable to that preservation of commons which is now necessary to England, the following scheme of legislation seems to be deserving of consideration.

In the first place, the statute of Merton, and those which explain and extend it, should be repealed. These statutes were passed at a time when the wants of society were perfectly different from those felt at present. They are intended to apply to circumstances and relations which no longer exist, except perhaps in name. They are liable to mislead the lord as much as his tenants, and to bring about the perpetration of unlawful acts. They are legally as useless as often practically mischievous. The Legislature having provided another fair and equitable means of inclosing waste spaces, these old-fashioned pieces of law-making, the first and principal of which was not even made by a Parliament representing the people, should be done away with. The repeal, to be thorough, would include the provisions touching commons of the statute of Merton (20 Hen. III. c. 4) and of the statute of Westminster the Second (13 Edw. I. stat. i. c. 46), and the statute 3 and 4 Edward VI. c. 3.

The repeal of these old statutes would not, however, be alone sufficient to preserve the open spaces of England. With regard

indeed to those in rural districts, nothing more can be necessary. The Inclosure Commissioners may be trusted to use their powers in such a way as to insure justice between lord and commoner; while the provisions in the various Inclosure Acts on the subject of village greens and allotments for recreation are enough to meet the wants of a small population.

But with regard to waste lands in the neighbourhood of large towns, some positive legislation would be required. A commencement of such legislation has already been made by the Act of last Session, which we have described above.<sup>1</sup> The provisions of this Act are good, as far as they go. The prohibition of any further inclosures (not already sanctioned by Parliament) by the commissioners within the Metropolitan police district is very valuable. The rest of the Act relating to schemes for the drainage, levelling, and improvement of metropolitan commons, and the making of "by-laws and regulations for the prevention of nuisances and the preservation of order thereon," will also be of great use, if acted upon. But doubts may reasonably be entertained whether it will have any considerable effect in operation. The originating proceedings (the presentation of a memorial on behalf of a scheme) may, under the 6th section, be taken by the lord of the manor, or by any commoners, or by the local authority, the latter being by the first schedule of the Act defined to be (according to the particular situation of the common in question) the Metropolitan Board of Works, the local board of the district, or the vestry of the parish in which the common or any part thereof is situate. By the 24th section the expenses incurred by the commissioners in relation to any memorial, or to any scheme consequent thereon, are to be defrayed by the memorialists, in default of ratepayers, inhabitants, or the local authority being willing to defray them. The memorialists thus running the risk of considerable expense, it seems very likely that no one will be found willing to present memorials, except the local authority. The slowness and conservatism of local authorities is well known, and it does not appear improbable that among these the Metropolitan Board of Works will be the only one

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<sup>1</sup> Vide *supra*, pp. 346, 347.

likely to move, though their expenses are to be provided for by a local rate. When once set on foot, numerous obstacles may be offered to any scheme by a determined opponent; even the reference of the bill in which it is incorporated to a select committee of either House of Parliament may be insisted upon. Such obstacles may not be forthcoming, and the fear here expressed of difficulty in originating schemes may be unfounded; but it does seem desirable at the present crisis, when real or reputed lords of manors are so active in aggression, if new legislation is at all required, to have something a little more positive and plain enacted. No provision is made in this Act to declare free from trespass those who enter on waste spaces for purposes of recreation. This might, and probably would, be dealt with by the particular schemes drawn by the commissioners; but might it not be dealt with more directly and surely? Finally, this Act only refers to metropolitan commons. Are there not other large towns whose interests in open spaces should be considered?

The following would seem to be a preferable course of legislation. Pass an act appointing a Board of commissioners, whose duty it should be to protect all open spaces situate within certain distances of large towns. These distances might be the same as those specified in the General Inclosure Act, 8 and 9 Vict. c. 118, as the distances within which no inclosure was to be made without special authority of Parliament. The distance therein prescribed of fifteen miles round London would in particular be a very proper distance within which to make the Act operative. Power should be given to the commissioners by the Act to rate the inhabitants of the districts adjoining for the preservation of the ground and the prevention of nuisances. The action of the police might at the same time be extended to these spaces. In fact, such a state of things should be inaugurated under this Act, as would now be in existence if a scheme had actually been drawn up and put in force under the Act of 1866, applying to each common in the neighbourhood of any large town.

The Board constituted under the Act suggested might, if the arguments contained in this Essay are of any weight, be considered as trustees and guardians of the rights of the public, as



well as of commoners. They would really stand in that position which a lord of the manor did originally, and does even now, theoretically, occupy. Consequently, no person could ever be convicted of trespass so long as he used the common in accordance with the regulations laid down by the commissioners. Its use for recreation being expressly sanctioned, the chief defect in the present state of things would be removed.

But it may be objected that such an Act could not be put in force without infringing the rights of the owners of the soil. It may be said that it is altogether begging the question, to decide that open spaces may be dealt with in this way while the lords' present position is not directly assailed. To such an objection we would answer that the lords' rights as at present claimed are without solid foundation in law, and that it remains to be seen what view is taken of them by our Courts of Law and Equity, now that the matter has been thoroughly sifted, and attention drawn to the origin and history of manorial institutions. It would therefore be better to avoid dealing by legislation with any of these alleged rights until it has been proved that they really exist. An Act such as we have suggested would purposely avoid saying anything on the subject. But, where any rights were claimed, which did in practice interfere with the operations of the commissioners, such rights should be required to be established by legal process before being allowed.

The great benefit to be derived from such an Act would not be any alteration in the rights of individuals, but the creation of an influential body, whose duty it should be to protect the interests of commoners and the public in open spaces, and to see that they were used in the manner most conducive to general enjoyment. The partiality which most confess to for natural over artificial beauty would no longer run the risk of being rudely shocked by the conversion of a common into a park; while on the other hand the eye would not be offended by gravel-pits and building excavations in the remaining rural haunts of townsmen. Englishmen, in short, would reap the benefit of a free and well-regulated usage of the beautiful spots that may still be found near their most crowded localities, and would be in no danger of expulsion from every inch of ground but the dusty road and the tea-gardens of the public-house.

## APPENDIX.

## (A.)

*(Referred to on p. 318.)*

THE passages of Bracton which define the different kinds of tenure are well known, but from their clearness are worth repeating. They are as follows :—

“ Tenementorum aliud liberum, aliud villenagium. Item liberorum aliud tenetur libere pro homagio et servitio militari, aliud in libero socagio cum fidelitate tantum, vel cum fidelitate et homagio, secundum quosdam.”

“ Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei præceptum fuerit, nec scire debeat sero quod facere debeat in crastino, et semper tenebitur ad incerta. Est etiam aliud genus villenagii quod tenetur de domino rege, a conquestu Angliæ, quod dicitur socagium villanum, et quod est villenagium, sed tamen privilegiatum. Habent itaque tenentes de dominicis domini regis tale privilegium, quod a gleba amoveri non debent quamdiu velint et possint facere debitum servitium. Et hujusmodi villani sokmanni proprie dicuntur glebæ ascriptitii. Villana autem faciunt servitia, sed certa et determinata.”—*Bracton*, b. iv. c. 28.

## (B.)

*(Referred to on p. 319.)*

THE form of homage to a subject, given by Britton, is the following :—

“ Jeo devienng voster homme de feez et de tenementz qe jeo de vous tieng et tener dei, et nomément pur tel tenement nommé par certeyne quantité et par certeynes boundes et pur tels feez, et fey vous porterai de vie et de membre outre totes gentz, sauve la fey qe jeo doi au roi et as ses heirs.” Which may be translated : “ I become your man for the fees and tenements which I hold and ought to hold of you, and especially for such a tenement ascertained

by certain quantity, and by certain bounds, and for such fees; and faith will bear you of life and limb beyond all people, saving the faith which I owe to the king and to his heirs."

The oath of fealty, according to the same author, was as follows:

"Ceo oyez vous, moen seignur Johan, qe jio Piers, de ceo jour en avaunt fei vous porteray de vie et de membre, sauve ma fey vers le roy et ses heirs, et les services qe a vous appendent des fees et des tenementz qe jeo tieng de vous leaument vous fray as termes dues a moen poer, si moi ayde Deu et ses saintz." Which may be translated: "Hear ye this, my lord John, that I, Peter, from this day henceforth will bear you faith of life and limb, saving my faith to the king and his heirs, and the services which belong to you for the fees and tenements which I hold of you will loyally do to you at the times appointed according to my power, so help me God and his saints."—*Britton*, c. 68, or b. iii. c. 4.

(C.)

(*Referred to on pp. 321 and 353.*)

In chapter 27, "Of Distresses," Britton discusses the case of a tenant bringing an action for damages against his lord for distraining his cattle; and he gives as one defence for the lord (sec. 20), "that he did it by judgment of his court;" "and therefore," he proceeds, "he may vouch his court to warranty, and in particular for a plaint made against the plaintiff by such an one his neighbour, who found security to prosecute his plaint, to which plaint this same plaintiff was summoned to answer at a certain day, at which day he neither came nor was essoined. Wherefore the court awarded, at the suit of the plaintiff, that he who now is plaintiff should be distrained to come to the next court, until he would submit himself to justice by law."

The plaintiff, however, was not, it seems, bound to put himself upon the record of the court. If he did, judgment went according to the record. "And if false judgment or erroneous proceedings be found in the record, and the action be in the county, we will not that the sheriff or suitors have cognizance thereof; but he who shall find himself aggrieved shall make his complaint, and cause the proceedings and the record to be brought by our writ before our Justices of the Bench at Westminster, and the error shall be there redressed, if any be found therein."—*Britton*, ch. 27, Mr. Nichol's recent translation.

Lord Coke's remarks on the distinction between a court-baron and a court-leet are as follows:—

"These courts" (*i. e.* courts-baron) "differ from Court Leets in divers respects. In this, that Court Barons by the law may be kept once every three weekes, or (as some thinke) as often as it shall please the lord, though, for the better ease both of lords and tenants, they are kept but very seldome: but a Court Leete by the statute of Magna Charta is to bee kept but twice every yeare; one time within the moneth after Easter, and another time within a moneth after Michal. 2. In this, that Court Barons may bee kept in any place within the manor (contrary to the opinion of Brian). But a Court Leete by the statute of Magna Charta is to bee kept in certo loco ac determinato, within the precinct. 3. In this, that originally Court Barons belonged unto inferior lords of manors, but Court Leetes originally belonged unto the king. 4. In this, that Court Barons are incident unto every manor, . . . but few have Leets; for inferiour lords of manors cannot keepe Court Leetes without speciall prescription, or some speciall patent from the king. 5. In this, *that in Court Barons the suitors are judges, but in Court Leets the steward is judge.* 6. In this, that in Court Barons the jewrie consisteth oftentimes of lesse than twelve, in Court Leets never: the reason of that is, because none are impannelled upon the jewrie but freeholders, in Court Barons of the same manor; but in Court Leets strangers are oftentimes impannelled. 7. In this, *that Court Barons cannot subsist without two suitors ad minimum*, but Court Leets can well subsist without any suitors. 8. In this, that Court Barons enquire of no offences committed against the king; but Court Leets inquire of all offences under high treason committed against the crowne and dignity of the king. In many other respects they differ, as that a writ of errour lyeth upon a judgment given in a Court Leete, but not in a Court Baron. So in a Court Leete a *capias* lyeth, but in a Court Baron insteade of a *capias* is used an attachment by goodes. So in a Court Baron an action for debt lyeth for the lord himselfe, because the suitors are judges; but in a Court Leete the lord cannot maintaine any action for himselfe, because the steward is judge."—*Lord Coke's Compleat Copyholder*, section 31, edit. 1650, pp. 60, 61, and 62.

(D.)

(*Referred to on pp. 324 and 326.*)

IN Lord Coke's report of Tyrringham's Case, the beginning of common appendant is explained in the following manner:—

"When a lord did enfeoffe another of arable land, to hold of him in socage, that is, per servitium socæ, as every tenure at the begin-

ning (as Littleton saith) was, the feoffee, ad manutenedum servitium socæ, was to have common in the lord's wastes for his necessary cattel which ploughed and manured his lands, and that for two causes:—1. Because it was, as was then holden, tacitè<sup>a</sup> implied in the feoffment; for the feoffee cannot plough and manure his land without cattle, and they cannot be kept without pasture, and by consequence the feoffee shall have (as a thing necessary and incident) common in the lord's waste and land.<sup>b</sup> The second reason was for the maintenance and advancement of tillage, which is much respected and favoured in law.

“So that,” he continues, “such common appendant is of *common right*, and commenceth by operation of law in favour of tillage.”<sup>c</sup>

This view of the origin of common appendant, it is obvious, exactly corresponds with Viner's.

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<sup>a</sup> *Sic.*

<sup>b</sup> The statute of Merton, c. 4, preamble, is referred to in support of this position.

<sup>c</sup> 4 Reports, 37 a.



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VI.

A LEGAL AND HISTORICAL

ESSAY

ON THE

PRESERVATION OF COMMONS

NEAR LONDON AND LARGE TOWNS.

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"SALVS POPVLI SVPREMA LEX ESTO."

CIC. *de Legib.* lib. iii. c. 3, § 8.

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"There are times when ancient truths become modern falsehoods."

STANLEY'S *Lectures on the Jewish Church*, Lect. 40.

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## ESSAY VI.

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If the glorious uncertainty of the law has often injured private individuals, its no less glorious certainty as regards the commons near London and large towns in England scarcely seems more favourable to the public. "In our country," wrote Lord Macaulay, "the dearest interests of parties have frequently been staked on the results of the researches of antiquaries. The inevitable consequence was that our antiquaries conducted their researches in the spirit of partisans."<sup>a</sup> The microscopic eye of the legal antiquary will not, or cannot, range beyond the comparatively narrow sphere of technical rights. Such other rights as may be alleged to have arisen from gradual changes, and a more complex system of society, are to him but so many undefined nonentities, creatures, for the most part, of a sentimental philanthropy. The unexpansive mind, which only accepts the guidance of strictly professional rules and precedents, views, in relation to an open space, the lord of the manor as one person, the commoners as several or many persons, the public as *legion*, that is, as no person or persons whatsoever, and sustains or discountenances, affirms or denies, the rights of the different claimants, according to their more or less definite or unascertained personality.

But is there any practical use in any kind of antiquarian research, if we grasp a mass of details, merely in order to become slaves of the past, without attempting to gather from them any general principles applicable to present or future circumstances? The study of law, than which no other is or should be more practical, becomes positively mischievous, and a bar to all progress and civilisation, if it fails to master or to distinguish between the most essential principles. There are primary principles, which are

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<sup>a</sup> Hist. of Eng. vol. i. p. 27.

immutable and for all time; and there are secondary principles, which must vary with the changeful exigencies of each succeeding age. The latter are subservient and related to the former as the means to the end. The public good, (to adopt a phrase which over-subtle lawyers have ere now scouted as too vague), is the principle which should regulate the conduct of the sovereign power in every state; it is the end for which laws are, really or ostensibly, made and altered by the Legislature. To treat a system of law as stationary were to render the existence of a Legislature altogether futile, and to relapse into that early stage of barbarism in which it was necessary to represent law as the end in itself, in fact, to make an idol of law. In one age, for instance, an increase of population, or the conversion of pasture into arable land, in another the very reverse, may be desirable as means towards the attainment of the public good. And if we consider that place as well as time must be taken into account, we shall see how important it is that the Legislature should be active in the exercise of its rightful powers, and assert the inviolable supremacy of that primary principle, of which it is the sovereign guardian, and which it is bound to preserve, by laying down, if necessary, from time to time, new secondary principles, in other words, by altering the letter of the law, that its spirit may ever remain the same, and by recognising new without doing violence to old interests. For to sacrifice new to old, or old to new, interests, were equally unjust and contrary to the public good, that is, generally, to the physical and moral, social and political happiness of the whole people.

Conspicuous among the new, or rather apparently new interests, which have already been to a certain extent, but by no means sufficiently, recognised by our Legislature, are those of the inhabitants of our more populous cities, and especially of the Metropolis, in relation to the open spaces in their immediate neighbourhood. Such interests are only new in so far as they have been first brought into prominence by the peculiar circumstances of the present age. For their existence and gradual growth must be coeval with, and have depended upon, the existence and gradual growth of large towns. The expediency of preserving those open spaces from inclosure, as well

on behalf of the health and comfort of the town-population as of the efficiency of the volunteer force, is so obvious, that in the absence of all opposition from more ancient and particular interests the question of right would hardly present itself for examination.

Unfortunately, advancing civilisation, while favouring the adoption of liberal and public-spirited measures, encourages, as indivisible from a correct idea of order, the presumption that every piece of land in the realm has some private rights of property almost inseparably attached to it. When, therefore, it is intended in real earnest to promote by some course of action the above-mentioned general interests, we at once find it necessary to oppose, if possible, right against right, so as to restrain within proper limits the claims more or less suddenly set up, in each case, by the owners of the soil, or their tenants, or both. The letter of the law has hitherto befriended these private claims, partly, it would seem, because they are based on rights, which, though anything but clear or distinct in themselves or in their mutual relations, yet seem to admit of technical definitions far more readily than the rights alleged by inhabitants of towns as such, and partly because they are preferred under cover of familiar and time-honoured legal terms. "Lord of the manor," "freehold," "copyhold," "homage," and many other similar expressions, have retained much of that ancient prestige which properly belonged to the long-since by-gone realities originally designated by them. The shell, as it were, by a sort of legal fiction is (somewhat wilfully) supposed still to contain the kernel, which the impartial historian knows and declares to have vanished.

Nevertheless, as events are said to cast their shadows before them, so old institutions may, perhaps, be said to leave their shadows behind them. Not only do their names survive in actual practice, but they themselves in a certain sense continue to live, as the ancestor lives through his descendants, or, to speak less metaphorically, as causes live through their effects. It is, indeed, notorious how many wholesome reforms have been retarded by the trammels of early Anglo-Norman traditions. But the fact that one of the best safeguards against reform degenerating into revolution is its *gradual* development, may to

a considerable extent justify the very great tenderness even now displayed by the majority of English lawyers towards private rights of property almost exclusively founded on those traditions.

It is extremely difficult, if not impossible, to fix even a proximate date for the origin of the rights and duties of lords of manors and of their tenants. 'Domesday Book' is the most obvious or convenient starting-point whence to trace our steps backwards as well as forwards. Amidst a multitude of problems as to the introduction of the feudal system into our island, it will suffice to touch upon the few leading facts of which we may be comparatively certain, and which may serve more directly to throw light upon our subject. Before the Conquest a quasi-Roman clientship bound the lower orders of freemen to the higher nobility. The political and military power which enabled the hlaforðs to protect those who "commended" themselves to them was closely connected with the ownership or possession of land; but the fealty and services of their dependants seem to have been wholly distinct from any tenure of land on the part of the latter. This general rule is not incompatible with, and may even derive some proof from, a few rare or doubtful exceptions. The lords held their estates allodially, and the duties involved in the *trinoda necessitas* were imposed on them, not by the king as a feudal superior, but by the state, or by the king as the sovereign representative of the state. It was with a view to the performance of these duties, and as a guarantee of social order, not merely for the sake of their own private advantage, that the lords accepted the fealty of the sithcundmen or sixhœndmen, or inferior nobility, and of the ceorls, or freemen of ignoble descent. A *commendatus* who occupied land of his own, or belonging to a lord, was strictly under no obligation, but rather found it to be his interest, not to desert his premises. Far different was the condition of the slave-cultivators of the soil, who were annexed to the glebe, and whose masters enjoyed all the rights of property over them unencumbered by correlative duties. These, whom the best historians presume to have been, at least originally, part of the conquered Britons, were in a position more or less analogous to that into which the ceorls would seem to have fallen between the Conquest and the time of Glanvil.

Notwithstanding that great loss of life attended the frequent insurrections, devastations, and famines, which followed upon the Norman occupation of the country, the *ceorls* (under the various names which they seem to bear in 'Domesday Book') must have always formed a very large element in the villein population, and their degradation must have contributed very considerably to the absorption of their rights by the lords, and to the consequent disappearance of many of the duties originally incumbent on the latter, either as relics of the Anglo-Saxon constitution or as part of the Norman feudal system. The feudal powers of the lords, however, were much checked by the paramount authority of the Crown. The Anglo-Saxon kings had been constantly endeavouring to strengthen and extend their prerogative. William the Conqueror profited by their successful policy, and exacted an oath of fealty to himself from the feudal followers of the *mesne* lords, thus breaking into the very essence of continental feudalism, namely, a chain, as it were, wherein each link was dependent exclusively on the one immediately above it.

But whatever difference there might be between the Anglo-Norman and the French or Franco-Norman systems, the tenures of land by free services, military or otherwise, were characteristics common to both. Of these tenures there were probably from their very first establishment not a few gradations. Either the weaker proprietors of land surrendered it to the stronger, in order to receive it back, encumbered indeed with various duties, but safer from the vicissitudes of those turbulent times, or the barons who possessed territories too extensive for their own actual use were content to parcel them out among such freemen as were able and ready to afford them assistance in war or agriculture. So long as the servile or semi-servile class of cultivators was the most numerous, the majority of free-tenants sustained their military character; but when a milder policy with respect to the former gained ground, and a variety of causes contributed to their enfranchisement, free tenancy ceased to be distinctively warlike. The increasing habit of freemen rendering, without dishonour, other than military services, would make it more easy and frequent for originally warlike tenures to become wholly or in part agricultural, while there might occur cases, though far more rarely, of agricultural rising into military

holdings. By this process the two kinds would tend to be placed on a level. Even in Bracton's age, however, the pure and simple villeins seem to have been not only very numerous, but in a most abject condition, and the mode of their tenure could hardly entitle them to the more dignified denomination of copyholders. While the distinction, so nice or so vague, between villeins in gross and villeins regardant, existed in practice, the former class had no direct connection with land, and the latter could only relatively to their future history be styled *tenants*, inasmuch as they were rather held by or to, than holders of, their lord's land. It should, however, be remembered that the villein was a slave only so far as he was retained or claimed by his lord; in the eye of the law he was a freeman, and was not hindered from acquiring, disposing of, or suing for property. A man can scarcely bear two different characters without the one modifying the other in the long run; and a villein's general law-worthiness might, therefore, induce his lord to treat him with some consideration. We cannot, if we aim at accuracy, rank among villeins, as such, the *sochemanni*, or the tenants in ancient demesne. The former performed fixed and determinate services, and could not be compelled to relinquish at the lord's will or remain against their own on the lands which they held in the soc or franchise of a great baron: "Et ideo," says Bracton, "denominantur *liberi*." The latter were the occupiers of tenements within such manors as had belonged to the Crown under Edward the Confessor or William the Conqueror. Bracton describes them, no less than the *sochemanni*, as *villani privilegiati*. No doubt in substance (though of course not in name) both these classes of tenants were copyholders, and most probably they were the first to claim and to obtain copies of the entries made in favour of their customary rights on the court-rolls of the manor.

Among the circumstances which led to the enfranchisement of villeins and consequent rise of copyhold estates may be reckoned the fusion of Norman and Anglo-Saxon, very much enhanced by the constant wars with France; the spirit of nationality resulting from and fostered by this fusion and these wars; the ease with which villeins could effect their escape owing to the unsettled state of the times, as well as to the general presumption of

the law in avour of freedom ; the indulgent disposition of clerical lords, who inclined towards the liberal doctrines of the later Roman Civil Law, and, owning an exceedingly large proportion of manors, probably found they could obtain more real profit from free than from slave labour ; and, finally we may add, the growth of commerce and of the interests and municipal rights of towns.

No doubt, lay as well as clerical lords perceived the advantage of allowing the labourer to entertain a feeling of security against being at any moment removed from the land which he in part virtually enjoyed as his own. Both his industry and his foresight would be materially increased by the possession of a less indefinite interest. Thus the necessities or the avarice of the lords caused them tacitly to permit their tenants to establish a legal right to what had originally been obtained by encroachment or favour. Customary courts took their place by the side of the courts-baron in most manors ; and both the latter and the former kind, from being the chief instruments for the declaration and exercise of the rights and powers of the lords, became, as it were, tribunals or parliaments wherein the rights no less than the duties of the tenants were determined or proclaimed. On the other hand, the fact or the supposition that the title of the tenants to their land was derived from an original grant, or depended upon the will of the lord, would tend to make the rights of the latter appear in the eyes of his tenants to have been first built upon a more legitimate and unexceptional foundation than mere might.<sup>b</sup>

In course of time, owing to the great executive influence of the Crown, aided by the growth of a general sentiment of nationality, the jurisdiction of the lords became more and more restricted. The manor-courts, in many respects, were rendered subordinate to, or supplanted by, the hundred and the county courts, the assizes of the justices in eyre, and, finally, the supreme courts established at Westminster. From these general observations it is not impossible to trace the fostering of a public

<sup>b</sup> How reciprocal the obligations, which bound the lord and his tenants to each other, became in course of time, may be deduced from the words of such old writers as Britton, Glanvil, and

Bracton :—"Tanta et talis connexio per homagium inter dominum et tenentem, quod tantum debet dominus tenenti quantum tenens debet domino præter solam reverentiam."

spirit wider and more comprehensive than the locally or personally confined spirit of feudalism strictly so called. The aim of this public spirit would be, more or less directly, what we should term the public good. We have seen how the rights of Norman lords at first, being essentially based on might, excluded the meaner sort of dependants from everything but heavy duties, and how the former were gradually compelled by the force of circumstances to yield an acknowledgment, however tacit, of some kind of customary or prescriptive rights in favour of the latter. A public spirit implying the desire and pursuit of a public good might, by quite as natural and equitable a course as that followed in the case of the rights and correlative duties of lords and their tenants, be matured into an acknowledgment of some kind of rights in favour of the public in connection with landed property, no less than with political and social and other general interests.

The few facts which we have noticed above concerning the Anglo-Saxon age would not lead us to infer the existence of manors before the Conquest. And, indeed, in the extant accounts of that age, we only meet with rare and ambiguous allusions to landed estates at all approaching to that description. With the exception of one doubtful instance of the word *manerium* occurring in a document of the time of Offa,<sup>c</sup> the name "manor" is said by competent authorities to have been first mentioned in the reign of Edward the Confessor,<sup>d</sup> when the period of Norman influence virtually began. The historical student should be careful not to confound analogies with resemblances. While the latter may be altogether wanting, the former may abound. Analogies are peculiarly attractive to the fancy, which is a dangerous guide in such an investigation as the present. We would not, therefore, lay much stress on the relations between the bocland and the folkland of the Anglo-Saxons, as compared with those between the land granted by the Norman kings to their barons, or by these to their freehold tenants, and the *terra regis* mentioned in 'Domesday Book.' The folkland seems to have been the public property of the state, and to have nominally belonged to the king only as usu-

<sup>c</sup> Ellis, General Introduction to Domesday Book, vol. i. 224, note.

<sup>d</sup> Ibid.



fructuary possessor, the "witan" giving their consent to his acting as a distributor on behalf of the public.

The *terra regis*<sup>e</sup> of 'Domesday Book' is termed in the original returns of the Exon Domesday, "demesne land of the king belonging to the kingdom" (*dominicatus regis ad regnum pertinens in Devenesira*," p. 75, Exon. Dom.) Likewise a particular manor (in the Exchequer Domesday) is said to have formerly belonged to the kingdom, but to have been since granted by the king to Earl Ralph.

There might, too, be said to exist some kind of analogy between the folkland and the lord's waste in a manor. The quantity and character of either would seem to have depended upon the disproportion between territory and population. The distribution of the folkland might virtually amount to an inclosure.

We might, however, only partially admit the indisputability of the following statement:<sup>f</sup> "The lageman, *habens socam et sacam super homines suos*, was indisputably the same character which afterwards was termed lord of a manor." Fleta's general description<sup>g</sup> of what a lord of a manor should be would have applied to a lageman as well; but it would be no less applicable at any time to a man blessed with the responsibilities of landed property and of civil or military government. We have seen, in fact, that the jurisdiction of the Anglo-Saxon lords was more like that of a governor on behalf of the state, and more directly public, than that of the Norman lords, whose rule over their own territories was more strictly feudal and for their own private advantage.

It little matters for the purposes of this Essay whether we accept the derivation of "manor" from *manoir* or from *manendo*,<sup>h</sup> in allusion to the lord's residence, or that from *mesner*,<sup>i</sup> implying that the tenants were under the lord's guidance. The latter interpretation would scarcely teach us more than we know

<sup>e</sup> Ellis, *op. cit.* vol. i. 230.

<sup>f</sup> Whitaker's Hist. of Whalley, p. 129.  
*Vide* Ellis, *op. cit.* i. 224, n.

<sup>g</sup> "In omnibus et supra omnia esse veracem, et in operibus fidelem, Deum et justitiam amantem, fraudem et peccatum odientem, malevolos et injuriosos

contemnentem, et apud proximos pietatem vultumque immobilem et plenum; ipsius enim interest potius consilio quam viribus uti proprio arbitrio," &c.—Lib. ii. cap. 65 and 72.

<sup>h</sup> Bracton's.

<sup>i</sup> Coke's.

already from other sources, namely, that the lord was the natural leader of his tenants in general, and more especially in war.

The origin of an English manor may be said to have consisted in a real or ostensible grant by the king to a great personage or baron, of a district for him and his family to dwell in, with power to exercise jurisdiction within the same, on condition that such services should be rendered or such yearly rent paid to the king, as the terms of the grant required. One and the same person in many cases held a number, often a very considerable number, of manors, which collectively constituted what was termed an "honour." It were superfluous here to proceed beyond a simple allusion to the process of subinfeudation, by which the tenants of the Crown set the example, so readily followed by inferior lords, of aiming at the attainment of military and political independence through the voluntary cession of at least the direct possession of part of their territories. The danger of this aim being really attained was the principal reason why the further creation of manors was prevented by the statute *Quia Emptores*.<sup>\*</sup>

How frequent this practice of subinfeudation had become is evidenced by the fact<sup>1</sup> that many manors, with the names of which we are familiar at this day, were at the time of the Domesday survey parcels of other manors now still in existence. One of the chief effects of such a multiplication of manors must have been an ever increasing variety of customs.

A manor may be described shortly as consisting of two parts, the demesne lands (*terræ dominicales*), and the lands distributed to freehold tenants. The former, which the lord retained in his own hands, whether waste or cultivated, strictly comprised the lands held in villenage; though by degrees the consolidation of the rights of privileged villeins, or freemen holding parcels of villein tenure, gave rise to a virtually distinct or third division.

Both the waste and the cultivated portions of the demesne were equally the immediate property of the lord. But, on the whole, with respect to the cultivated portions, he might appear to have been in a less advantageous position than with respect

<sup>\*</sup> 18 Ed. I. c. 1.

<sup>1</sup> Ellis, *op. cit.* i. 41.

to the waste. The villeins, or tenants in villenage, who cultivated the former for the lord, were suffered to occupy them permanently, and through this very occupation gained rights as against the proper owner of the soil; but their use of the waste for depasturing their cattle was a more precarious or a less complete occupation, and could not suffice to undermine to the same extent the ownership of the soil on the part of the lord. The cattle which were turned on the common pasture by the villein tenants belonged to the lord, and it was therefore strictly on behalf of the latter that the right of common was exercised by the former.

On the other hand, the lord's control over his waste lands, however absolute in law as against his villeins, was very much limited by the common rights of the freeholders. *Their* use of the common pasture was on their own account, and by the mouths of their own cattle. The grant by which the freehold was created gave, as of common right, sufficient pasture for as much commonable cattle as the ancient arable land granted could maintain through the winter. The diminution of freehold grants after the statute *Quia Emptores* was counter-balanced by the increasing frequency of grants of copies to tenants in villenage. As the ancient arable land, which was thus turned into copyhold, slipped, as it were, from the proprietorship of the lord, the interest of the copyholders as commoners became more and more distinct from, and qualified, that of the lord as owner of the soil of the common lands.

The greater numbers of the villeins and tenants in villenage, from whose privileged tenures the copyhold estates still extant in our time are descended, partly explain the fact that we now hear more of copyholders than of freeholders claiming or enjoying rights of common. It has, however, been noticed by historians<sup>m</sup> that there existed a multitude of small freeholders towards the end of the 17th century. These would seem to have sprung in great part from the enfranchisement of copyholds. The increased security and dignity of the estates of the tenants might well be expected to have strengthened, rather than impaired, those customary rights of common, which in 1791

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<sup>m</sup> Macaulay's Hist. of England, vol. i. (c. 3), p. 335.

were finally adjudged, at least in *equity*, not to be destroyed by such enfranchisement.<sup>a</sup>

The statute *Quia Emptores*, by putting a stop to the further creation of manors by subinfeudation, caused the subsequent development of the law to resemble that of a new language, which derives many a characteristic detail, but not its distinctive general system, from a dead one. The study of a language which, being no longer subject to the corruptions of constant use, has been, as it were, enshrined by science, is the best guide towards a complete knowledge of modern dialects. Likewise, from a more or less detailed view of the constitution of feudal manors and their courts, may be gathered a correct idea of the history and modern features of freehold and copyhold tenures, and of the rights of common connected with either of them.

So far as the subject of courts-baron can be considered apart from that of customary courts, our attention is first called to the former by their chronological priority over the latter. As late as the forty-second year of the reign of Edward III. a lord might seize the land of a customary tenant or copyholder as forfeited for non-performance of services; and it was not before the Wars of the Roses had committed terrible havoc among the families of the English nobility, and given, as it were, the *coup-de-grâce* to the feudal system in the reign of Edward IV., that the judges permitted the copyholder to bring his action of trespass against the lord for dispossession. The only *real* manor, therefore, was originally that of which the most essential element were the freeholders. *Customary* manors, *viz.* such as consisted of copyholders, were of much later growth, and, as such, in the absence of freeholders, were so styled by a kind of analogy, or because they were supposed, either with truth or by a legal fiction, to have once upon a time contained freeholders whose places had since been filled up by the copyholders. So inseparable, indeed, from the idea of a manor was the holding of a court-baron, or court of the freeholders, therein, that a man is said to have a manor *in gross* when he has a right and interest (which he or his ancestors must have enjoyed time out

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<sup>a</sup> *Styant v. Staker*, 250, Eq. Ca. Abrid. 104.

of mind) to hold a court-baron with the perquisites thereof, while another person has all the land in that very place where the court is held. *Melwich and Luter's Case*<sup>o</sup> has been cited in favour of a contrary decision, but, having been expressly denied to be law by a later judgment, it has served to display more clearly the opinion which prevailed at the beginning of the 17th century. We read in Nelson's '*Lex Maneriorum*'<sup>p</sup>—“In *Melwich and Luter's Case*, he [Lord Coke] tells us that it was resolved that every manor consists of freeholders and copyholders, and comprehends in effect two courts—the one a court-baron for freeholders, and in this the suitors, *i.e.* the freeholders, are judges; and the other court is for copyholders, and in that the steward or lord himself is judge; and *though the last is not properly a manor in law, because it wants freeholders*—as, for instance, if the lord grants the inheritance of all his copyholds to T. S., by this grant they are severed from the manor, and, by this severance, 'tis no longer a manor in law for want of copyholders, of which a manor must consist as well as of freeholders—yet the grantee may hold a court which he calls a *customary court* for his copyhold tenants, and take surrenders, and make admittances, &c. But this resolution in *Melwich and Luter's Case* was about eight years afterwards denied to be law, and we are told that it was a strange judgment, and that it was afterwards reversed upon a writ of error in the Exchequer Chamber; and this is in a case reported by Justice Croke, *viz.* the manor of C. extended both to C. and D., in the last of which places there were only copyholders for life, and no freeholders; the lord of the manor levied a fine, and suffered a recovery of the manor (excepting his lands in D.) to several uses; and, some time afterwards, he kept a court-baron in D. by R. W., his steward, and granted a copyhold to R. R. for life: adjudged that this grant was void, because D. was not a manor, and in this case that of *Melwich and Luter* was cited and denied by the court to be law.—Cro. Eliz. 443—*Bright v. Ford*.”

A further quotation from the same work may illustrate the true relations between the court-baron and the customary court,

<sup>o</sup> 4 Rep. 26.

<sup>p</sup> *Lex Maneriorum*, by Wm. Nelson, 1733 (p. 68, &c.)

and tend to prove the important fact that the consent of the homage, or jury of copyholders in a manor-court, cannot in law be deemed sufficient to bind the freeholders to the observance of any judgment given by the lord of the manor or his steward:—"The same point was adjudged in 2 Cro. 259, in the case of *The King v. Stafferton*, viz. that a manor may be held of another manor by copy of court-roll, and that the lord of such a manor may grant copies, and that the manor itself will pass by a surrender and admittance of the surrendree, and fines shall be paid, &c.; but that a copyholder, who is lord of such a manor, cannot hold a court-baron to have the forfeitures, or hold pleas in a writ of right, because 'tis *oppositum in objecto* that a copyholder should hold such a court, who is no more than a tenant at will of the superior lord.—2 Cro. 259."<sup>a</sup>

A certain number of freemen, *liberi homines*, or socmen, as they are called in 'Domesday Book,' were necessary to every lord of a manor for holding the pleas of the manor court or soke. Such a necessity would appear to be unmistakeable evidence of the powers and the rights of the lords not being unlimited. We find, however, that these *liberi homines* were at times very curiously treated. There are instances of one lord lending some of them to another, in order that the latter might hold his pleas, and of their consequent removal from one manor to another, no mention being made of their will having been previously consulted. Sometimes<sup>r</sup> they were retained *with their lands* by the borrower or his followers without any one coming to the rescue.

The court-baron being the lord's court, and not a court of record, must be distinguished from the court-leet, which was the king's court and a court of record; though the lord of a manor, as well as the lord of a hundred, might have had the right of holding the court-leet, and of taking the profit of it conferred on him by Royal Charter. In the court-baron the freeholders, or suitors (*sectatores*), were the judges, while the lord or his steward acted as president or registrar. This is the common

<sup>a</sup> Lex Man. p. 234.

<sup>r</sup> Ellis, *op. cit.* i. 236, n. In Cambridgeshire, "Tres istorum sochemanorum accomodavit Picotus Rogerio Co-

miti propter placita sua tenenda, sed postea occupaver, eos homines comitis et retinuer, cum terris suis sine liberatore."

account, but it is difficult to comprehend satisfactorily how the same persons could be suitors and judges in their own causes. Probably, the parties interested in each case were excluded from having a voice in the judgment, while the decision of the dispute or plaint was left to the rest of the freeholders. Thus, *the suitors being judges* would mean the right of freeholders to be judged by their peers. The jurisdiction of the court would extend over nuisances and misdemeanors, and controversies relating to landed property within the manor. What was to be deemed a nuisance or misdemeanor, or a question concerning land within such jurisdiction, depended, for the most part, upon the customs of each manor. The custody and right interpretation of these customs seem to have belonged to and to have been expected from the steward of the lord of the manor. The description of a steward, or a *præfectus*, or *præpositus, manerii*, or *villæ*, to be gathered from 'Domesday Book,'<sup>\*</sup> is to the effect that he collected rents, levied distresses, prevented trespasses, kept the peace, and generally performed all the offices of equity and right between the lord and his tenants. He appears sometimes either to have been allowed, or to have assumed to himself the liberty of dealing with parts of the lands entrusted to his administration in favour of his friends or otherwise, according to his pleasure.<sup>†</sup> A more definite idea of the peculiar duties of a steward than of those of the lord of a manor may be derived from Fleta (*temp. Edw. I.*):—"Provideat sibi dominus de *seneschallo* circumspecto et fideli, viro provideo et discreto, et gratioso, humili, pudico, pacifico, et modesto, qui *in legibus consuetudinibusque provincie* et officio seneschalchie se cognoscat, et jura domini sui in omnibus teneri affectet, quique suballivos domini in suis erroribus et ambiguis sciat instruere et docere, egenis parcere, et qui nec prece vel pretio velit a transite justitie deviare, et perversa judicare, *cujus officium est curias tenere maneriorum, et de subtractionibus consuetudinum, serviciorum, reddituum de sectis* ad curiam, de mercat, molen-

<sup>\*</sup> Ellis, *op. cit.*

<sup>†</sup> Ibid., *sub v. Etwelle* in Surrey, "Testantur homines de hundredo quod de hoc manerio subtractæ sunt duæ hidæ

et una virgata quæ ibi fuerunt tempore Regis Edwardi sed præpositi accomodaverunt eas suis amicis, et unam denam silvæ et unam croftam."

dinis domini et ad visum franci plegii aliarumque libertatum domino pertinentium inquirat," &c.—Lib. 2. c. 66.

The word *judicare* may here allude to cases of manors where the steward was judge *by special custom* in the court-baron; or if we admit the existence of customary courts (of copyholders) at so early a date, it would apply to his usual functions as judge in such courts; or it may be taken in a less strict sense, as referring to his duties of president, or registrar, or interpreter in courts-baron. The importance of a correct estimation of the position of the steward (as being a sort of trustee for the lord), with a view to a better understanding of the relations between the lord and his tenants, may justify our again quoting verbatim the useful work on the law of manors already cited above:—

"It was adjudged in the case before mentioned [*viz.* Gentleman's Case, 6 Rep. 11] as reported in 1 Leon.,<sup>\*</sup> that the steward of a court-baron might be judge of the said court *by custom*; and yet in another case it was held that a lord of a manor cannot *prescribe* to hold a court-baron before his *steward*; it was admitted that he might prescribe to hold *a court* before his steward, but not a *court-baron*, because that must be held *coram sectatoribus*, and not before the steward. See 2 Cro. 512, 582,<sup>†</sup> *Armyn v. Appletoft*; 1 Leon. 216, S. P.; 1 Brown, 41, S. P.; Godb. 68, S. P.; T. Jones, 23, S. P."

"All the latter authorities are according to that judgment reported in 1 Leon.; for in 1 Mod. 173 it was adjudged that a man might *prescribe* specially to have a court-baron held before his *steward*; and in another book it was adjudged that such a court might be held before the steward *secundum consuetudinem manerii* (which exactly agrees with the report in 1 Leon.), and<sup>‡</sup> there we are told that the Lord Chief Justice Vaughan was of that opinion. T. Jones 23, 1 Mod. 173. A steward might set a fine upon any person in the court for a contempt to himself, but could not *amerce without a prescription*. The right of amercing, in cases of copyholds, would belong to the homage.<sup>§</sup> In replevin the defendant prescribed to *distrain* for all *amercia-*

<sup>\*</sup> Lex. Man. p. 73.

<sup>†</sup> 1 Leon. 316.

<sup>‡</sup> See 2 Cro. 282.

<sup>§</sup> In *Erish v. Wells*, T. Jones, 23.

<sup>¶</sup> Lex Maner. p. 231.



*ments* in the manor, &c., and that the plaintiff, being a copyhold tenant, was presented by the homage for not *repairing* a copyhold tenement, for which the steward *amerced* him 10*s*. It was adjudged that the steward could not *amerce* without a prescription. 1 Leon. 242, *Blunt v. Whitacre*." Doubtless, if such a right was properly exercised by the homage in copyhold cases, a similar right must have been exercised by the freeholders in cases affecting their own tenure; and more especially because, as we have seen, the steward occupied a less commanding, though scarcely less respectable, position in a court-baron than in a customary court. How far such a limitation of the power of the steward by the homage is a real one depends upon the constitution of the latter. It has been said to consist of a certain number of copyholders, such number varying according to the custom of the manor, in each case,<sup>b</sup> and to be sworn by the steward. The question, then, is whether the swearing implies the choosing, and whether the "certain number" means that a court must consist of not less, though it may consist of more, than such a number of copyholders. If the steward is entitled to choose out of the whole body of copyholders, whether present or not, the number required, he becomes virtually the jury as well as the judge in a customary court; for he would take care to reject all, or as many as possible, of those who might be suspected of opposition to the lord's interest or desires. The definition of the homage as a jury at a manor-court for the trial of copyhold cases, (the substance of which definition we may gather from old law-books), would imply that questions of fact (whether, for instance, a certain act has been done involving the breach of a certain custom), are to be decided by the homage, while questions of law, that is, the law of the manor (whether, for instance, a certain custom does exist, and its breach is involved in the doing of a certain act), are to be settled by the steward, as judge in the court of the copyholders. We may compare the *amercement* by the homage to the assessment of damages by a Common Law jury.

"Tis<sup>c</sup> certain that, upon an *erroneous judgment* given in a

<sup>b</sup> *e. g.* seven or eight in the case of Wimbledon Manor, Rep. of Select Com. 1865, 5837.

<sup>c</sup> *Lex Maner.* p. 71.

court-baron, no writ of *false judgment* lies, and the party grieved hath no remedy but in *Chancery*, or by *petition to the lord of the manor*, who ought to relieve in such case according to conscience, for he is the<sup>d</sup> chancellor in his own court; and if he is chancellor, he is certainly *judge* of the court, and 'tis properly the office of a judge to relieve and reform errors."

"The<sup>e</sup> lord of the manor is<sup>f</sup> chief in authority, his acts are good, tho' an infant, or tho' outlawed in a personal action, or excommunicated; and, tho' but tenant for years, at will or by statute merchant, he is *dominus pro tempore*, and a lawful lord for the time being, to make admittances upon surrenders or descents, to grant voluntary copies of ancient copyholds, &c. His authority consists in punishing offences within his precincts, as for non-performance of customs, for breach of by-laws, &c, and in deciding controversies about the title of copyholds within his manor, where he may redress the same as a chancellor in his own court."

The former of these two passages seems to speak generally concerning the manor-courts, or especially with reference to the court of the freeholders; the latter, though commencing in general terms, proceeds to mention more particularly the lord's relations towards his copyholders. The doubts, however, by which we are encompassed as regards the extent of the authority of the lord, are not to be resolved by single instances, or by a hasty acceptance of statements *superficially* accurate or well-defined, but rather by the contemplation of history from a higher point of view, so as to distinguish the really different meaning of the same terms as applied in a more or less sweeping fashion to divers subject-matters.

The court-baron cannot be said to be the lord's court in the sense in which the customary court admits of that description. A wrong (or very probably wrong) interpretation of the term "court-baron" may have led to the former being so called. The word *baron* originally signified the *men* or the *freemen*, and, accordingly, the *court-baron* signified the "court of the freemen." But the employment of the same word, *par excellence*, as designating a chieftain or *baron* in the later feudal sense, would seem to

<sup>d</sup> Owen, 63.      <sup>e</sup> Ibid. p. 69.      <sup>f</sup> 4 Rep. 24; 9 Rep. 49, 50, 51; 1 Inst. 58 b.

have resulted in the notion that *court-baron* was strictly equivalent to "court of THE *baron*," or "*the lord*." The lord not being, except by special custom, judge in the court of the freeholders, but, on the other hand, being the judge of his customary court, cannot act as chancellor so absolutely with respect to the former as he can (as it were of common right) with respect to the latter. The appeal in the case of the homage lies against the lord's steward, while in the case of the freeholders it lies against the virtual majority of the freeholders; that is, the party cast in the suit (or more or less small minority of *freeholders*) would appeal against the judgment given by the majority of their own body. As that minority might at any time have to act as *judges* in other cases, it is not likely that, in practice, such appeals would ever be frequent on the part of the freeholders.\* The lord's conscience would thus, from that of a chancellor, insensibly become that of an arbitrator, whenever it happened to be consulted by freeholders, who might otherwise at once appeal to the High Court of Chancery. The lord would have a manifest right to reverse the sentence or judgment of his steward, and, as an appeal against the latter by copyholders would not be, so to speak, suicidal, that is, subversive of their own rights or of the privileges of their homage, the exercise of the lord's chancellorship in his customary court might be comparatively real and frequent.

What has been said above as to questions of fact and questions of law being settled by the homage and by the steward respectively is not, of course, to be accepted as an absolute general rule, but subject to such modifications as may have been introduced into any manor by particular customs. But a custom, in order to be good and valid, must be reasonable, according to common right, upon good consideration, compulsory, certain, and beneficial to the lord or tenants. There may be a good custom for the tenants of a manor to make bye-laws to

\* Such appeal, or removal of a cause from an inferior court to a superior, must be distinguished from the *criminal appeal*, or *challenge*, as between a plaintiff and defendant in the first instance. *Vide* Toml. Law Dict. *ad verb.* "Appeal," and "Battel." In France "an

appeal for false judgment might indeed be made to the suzerain, but it could only be tried by battle." Hallam, *Middle Ages*, (11th ed.) vol. i. p. 243. "In England the appeal for false judgment to the king's court was not tried by battle. Glanvil, lib. xii. c. 7." *Ibid.* n. z.

bind themselves; while the validity of a custom for them to make bye-laws to bind strangers, even though acting against such bye-law within the precinct of the manor, would be, to say the least, extremely doubtful. It cannot be admitted that an alleged custom for the bye-laws made or acts done exclusively by the homage to bind the freeholders, is either reasonable or according to common right and justice. In general, sufficient public or particular notice should be given of a bye-law made by the homage to the persons intended to be bound by it; but if the bye-law is intended to bind all those tenants who ought by custom to appear at the court wherein it is made, all such tenants will be bound by such bye-law, even though no particular notice has been given to any of them.

“Sir John Stowell,<sup>a</sup> lord of the manor of Somerton, in the county of Somerset, prescribed to have *curiam legalem* in a great moor, part of the said manor, for the better ordering the cattle of the tenants, in which moor they had a right of common; and at which court all the commoners ought to appear by custom, &c., and that an homage hath been used to be sworn there by the steward, which homage hath used to present all offences in the common, and to make bye-laws for the better ordering thereof, which the commoners ought to obey under a reasonable penalty to be assessed on them, and to be forfeited to the lord; and that at such a court, &c., the homage being sworn, made a by-law that no commoner should put his sheep in such a part of the said moor under the penalty of 3s. 4d., to be forfeited to the lord of the manor; and that this by-law was published and proclaimed in the court. *In replevin*, &c., the defendant made conusance for the taking, and set forth all the matter above-mentioned, and that the plaintiff had offended against this by-law, and so justified the distraining for the penalty; and upon a demurrer this was adjudged a good law, because it did arise out of a custom which began by the consent of all parties, and therefore shall bind all the commoners, especially since it doth not take away all the common, but only for sheep, and that in a particular place of the moor; so that the commoners may have common for other cattle, and over all the moor, but only in that place . . .

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<sup>a</sup> Lex Maner. p. 55.

and . . . it was adjudged, that every commoner ought to take notice of this by-law without any particular *notice* given to him, because they are all to appear at court; and the custom is alledged to be, that if the by-law is proclaimed, it shall bind them all, which is a personal thing. Cro. Car. 497: *Tintney v. James*."

In this case the "commoners" who "ought to appear," &c., and who "ought to obey" the bye-laws made by the *homage* for the better ordering of the common, must have been copyholders; for freeholders could only have been under the obligation of attending their own court-baron; and, even though a homage might be sworn and make bye-laws for the copyholders at the same time and place, a custom for the freeholders, who are both judges and suitors, to obey the homage, who are only suitors and subject to the steward as judge, would have been condemned as unreasonable, or as contrary to common right.

"Custom of a manor, that the *greatest part of the tenants, appearing at any court to be held in and for the manor, may make by-laws* for the better government of themselves, &c., and that a by-law so made should bind all the tenants, and that at such a court, &c., a *by-law* was made, that no tenant of the manor should put into such a *common any steer being a year old* or more, under the penalty of 6*d.* for every offence, for which it should be lawful to *distrain*; and in *replevin* the defendant justified the taking, &c., by virtue of this *by-law*; and upon a *demurrer* to this plea, it was adjudged that this *custom was void*, 'tis against common right to restrain a man from putting in commonable cattle where he hath *right of common*; but if the custom had been that no tenant should put in a steer *before such a day*, such custom had been good, because it is for the better government of the *common*, and doth not wholly deprive a man from the right of *common*. 1 Leon. 189, *Erbury v. Latton*."<sup>1</sup>

In this instance *the tenants* probably are to be interpreted to be the copyhold tenants. The freeholders might form the minority, and even if all were present at their court-baron, they might thus be rendered subservient to the homage; that is, the Common Law or prescriptive rights of the free tenants would be

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<sup>1</sup> *Lex Maner.* p. 90.

sacrificed to the baser customary rights of the copyholders. Such a custom might thus appear to fail in certainty as well as in reasonableness and legal justice. An *amerciament* being, in the terms of the law, a *penalty assessed by the equals of the offender*, a body of copyholders, even though being such a majority as above mentioned, could not according to common right amerce an alleged offender who happened to be a freeholder.

The private character of the court-baron and of the offences which might be brought under its cognisance is the more apparent when a court-leet is appended to a manor. The goods distrained (by distress *infinite*) in order to enforce the appearance of a defendant at a court-baron are not forfeited, neither can they be sold by the bailiff of the manor. The lord must allege a prescription to distrain. But to a court-leet a distress was incident of common right; and at Common Law the attachment of the defendant by his goods, when he fails to appear, is followed by forfeiture.

The following instances of presentments at courts-leet may not be out of place here :—

“<sup>k</sup> *Presentment* at a court-leet for inclosing a road, and building a cottage *ad commune nocumentum* of all the inhabitants of the Vill of H. This being removed into B. R. by *certiorari*, it was objected that it was not good, either upon the statute 31 Eliz. cap. 7, made against building cottages, because 'tis not alledged that it was built *for habitation*; and the statute inflicts a penalty of 10*l.* on any person who builds a cottage contrary to that law; besides it ought to conclude *contra formam statuti*, &c., neither is it good at *Common Law*, because *inclosing the road and building a cottage on the waste* is an injury done to the lord of the manor, and not presentable at a leet, so as to subject the offender to an *amerciament*, because 'tis not a *publick nuisance*: now a leet cannot amerce for a *particular trespass* done to the lord of the manor, or to any other person where an action will lie to recover damages, but only for a *publick nuisance*, which this is not, therefore it was quashed. 1 Saund. 135. *The King v. Dickenson*.”

“<sup>l</sup> The defendant was presented at a leet for breaking the

<sup>k</sup> *Lex Maner.* p. 192.

<sup>l</sup> *Ibid.* p. 193.

soil and digging *cony-boroughs in the lord's waste*, which presentment being removed into B. R., it was objected that a leet cannot amerce for anything done to the damage of the lord,<sup>m</sup> but that he ought to bring his action of trespass; besides this presentment concluded *ad commune nocumentum*, which is false; and for these reasons it was quashed. Raym. 160. *Ayre's Case*."

"<sup>n</sup> *In replevin* the defendant made *conusance* as bailiff to T. S. setting forth that he had a leet within his manor of H. &c., and that at such a court-leet there held on such a day, &c., the plaintiff was amerced for putting his *geese on the common*, for which *amerciament* the defendant *distrained*, and so justified the taking, &c., and upon a demurrer to this *conusance* the plaintiff had judgment; because this was not an article inquirable in a court-leet, or punishable there. Cro. Eliz. 448. *Warmleighton v. Burton*."

We may easily account, in a general way, for the existence of waste lands in more or less early times, however different the immediate causes of such existence may appear to have been in different ages. Cæsar<sup>o</sup> has been cited as mentioning the practice prevalent among the ancient Germans of devastating the country adjacent to their chief residences by way of ensuring their safety against hostile invasion. It is not improbable that this practice was introduced to a certain extent into England by the Saxons, and that, joined with an excessive love of the chase, it contributed to the creation or preservation of the many forests which covered a great part of this island both before and after the Norman Conquest. The Danes,<sup>p</sup> wherever they settled, brought with them very absolute ideas concerning property in land, and to these ideas may perhaps be referred, in some degree, the legal view that to the owner of the soil belongs all above it and all beneath it. The Anglo-Saxons converted parts of the country into a desert in self-defence, and the Danes sought success in their inroads through the same bar-

<sup>m</sup> "They cannot amerce for common trespasses, *but only for public nuisances*, 1 Saund. 135."

<sup>n</sup> *Lex Maner.* p. 189.

<sup>o</sup> Cæs. Bell. Gal. lib. vi. apud Fossebrooke's Hist. of Gloucestershire, p. 134.

where the Forests of Kingswood, Dean, and Malvern, near Bristol, Gloucester, and Worcester respectively, are mentioned as instances.

<sup>p</sup> *Vide* Palgrave, Hist. of Eng. and Norm. vol. i. pp. 692, 693.

barous means. Yorkshire and Hampshire, (to mention only principal instances), were depopulated by William the Conqueror. A scarcity of tillers of the earth would extend the limits of waste lands, and such extension would, in its turn, prevent an increase, or rather result in a further decrease, of population.

Thus after a great baron had distributed parts of his manor to his free dependants to hold in severalty, and had reserved parts as his own demesne for the use of himself and his family, the last-mentioned parts being cultivated by his villeins or tenants in villenage, there remained more or less vast tracts of territory, which could not be cultivated owing to a want of hands as well as of agricultural knowledge. It was the interest of the lord of the manor to provide the freeholders with sufficient pasture for the cattle which were to plough and manure their arable land, to the intent that they might be the better able to render their services. Thus were other portions granted to be occupied by the freeholders as common fields or meadows, different parts of which were used for different purposes, or which were at different times used for different purposes. These were what are now termed commonable lands, and common only in a restricted sense. The tenants who enjoyed them in common relatively to each other, had a several right, and might keep them inclosed as against strangers. They are therefore distinguishable from the lord's waste, which was left open to such tenants as had not received, as well as to such tenants as had received, a grant of commonable lands. Well-known species of the latter are "*lammas* lands," and "*shack* lands." These resemble each other in that they consist of open arable land held in severalty during a portion of the year, until the removal of the crop. The "*lammas* lands," which may comprise meadow-land also, after the crop has been removed become commonable not only to the parties who have the severalty right, but to other classes of individuals; while the *shack* lands become commonable to all the parties having severalty-rights, but to no others. The *lammas* lands, therefore, partake more of the nature of common lands, strictly so called, than the *shack* lands, especially since the severalty holders upon the latter usually hold the fee of their several portions. Commonable lands, in general, would seem,



therefore, to owe their origin to a sort of compromise, and to have occupied an intermediate position between the lands simply owned or held in severalty, and the lord's waste. Such a compromise, when carried to its farthest extent,—that is, when commonable lands are recognised to the exclusion of all others,—probably betokens a rude stage of society; as, for instance, in the case of the Slavonian and other eastern tribes.<sup>4</sup>

Though many of the observations which we may have to make concerning *common* lands, or the lord's waste, may be more or less applicable to *commonable*<sup>5</sup> lands also, yet the former come more particularly within the sphere of the present subject, and to the former, therefore, will the following pages more particularly refer.

The lord's waste being left completely open, became, as it were, a common appendage to the cultivated lands of the manor. The freeholders on their own behalf, the villeins on the lord's, and the free tenants in villenage partly on their own, partly on the lord's, according to the extent of their respective privileges, made use of it for such purposes, in such ways, and in such degree, as custom allowed or enjoined. Hence arose the distinctions between common of pasture, of estovers, of turbary, and of piscary, as to the purpose or subject-matter; of common appendant, appurtenant, in gross, and of vicinage, of stinted and unstinted common, as to the way and degree. A detailed or systematic exposition of the meaning of these terms must not be attempted in this place, inasmuch as every one at all interested in the question before us may be supposed to have perused the standard treatises wherein the technicalities of the law of rights of common are explained.<sup>6</sup>

In the mutual relations of the four chief kinds of land enumerated in 'Domesday Book'—viz. *terra, silva, pastura*, and *pratum*<sup>7</sup>—we catch the first glimpse of common of pasture appendant and appurtenant. *Terra*, or simply arable land, was held

<sup>4</sup> Vide Maine's Ancient Law, c. viii.

<sup>5</sup> On commonable lands (lammas, &c.) vide G. Wingrove Cooke; 'The Act for the Inclosure of Commons,' &c.; Reports of the Select Committee of the House of Commons, 1865, &c. &c.

<sup>6</sup> Vide Bird (J. B.), Law of Commons

and Commoners, &c., 1817, being the last edition of a work first published in 1698; also W. Cooke, *op. cit.*; Woolrych, On the Law of Rights of Common; Toml. Law Dict. *ad verb.* "Common," *et al.*

<sup>7</sup> Ellis, *op. cit.* p. 95.

in the highest estimation. The expression *pastura ad pecuniam villæ* is most frequent, and there occur a few instances of *pastura communes*. *Pratum bobz* or *carrucis* signified meadow sufficient for the oxen employed in tilling the arable land, or proportionate to the ploughlands. Thus the *pastura* and the *vratum* might be taken as appendant, if considered as belonging to the arable land in each case as of *common right*, or they would be appurtenant if claimed by virtue of a grant or prescription. The *silva*, on the other hand, or woodland, which was everywhere most carefully entered in the Domesday survey, chiefly for the sake of acorns and beechmast, must be viewed only as appurtenant, as hogs are not commonable cattle, to which common appendant is restricted.

When the lord of a manor enfeoffed a freeman with arable land in consideration of certain services to be performed by the latter, the Common Law, we might even say Equity, interfered in favour of the tenant, so as to prevent the consideration given by the lord from being virtually no consideration at all, through the tenant's receiving no provision for the maintenance of the cattle, without which his land could neither be ploughed nor manured. And, therefore, both by way of encouraging the tillage of land for reasons of public policy, and because viewing the lord and his free tenants as in the position of contracting parties, the law did not make it optional for the lord to grant or not, according to his pleasure, a right of common pasture over his wastes to his freeholders, but by its own operation appended such right to the arable lands granted (for as much commonable cattle as were *levant* and *couchant* thereon) as incident to the feoffment. But as regards the villeins and tenants in villenage, the only rights of property originally acknowledged by the Common Law were those of the lord. Indulgence, however, or prolonged sufferance on the part of the latter was in course of time presumed, and at length even declared, to have ripened into a customary right, or right by virtue of an imaginary or immemorial *lex loci*, to be enjoyed by such tenants over both the land which they had occupied for purposes of cultivation and the lord's wastes which they had used for depasturing their cattle, or for gathering fuel, or for repairing their houses or agricultural implements. Copyholders are not therefore entitled

to any kind of beneficial enjoyment of the lord's wastes *immediately* of *common right*, but only mediately, so far as it is through a general principle enforced by common right that any special custom is binding on the lord and his tenants.<sup>a</sup> Similar in nature to this legal presumption, that the lord was, as it were, by the mysterious authority of some primeval law obliged to respect privileges the exercise of which he had long and continuously neglected or not chosen to prevent, is the rule that he must not do any act inconsistent with the terms of his own grant. This rule is the mainstay of the right of common appurtenant. Such a right must, indeed, have existed before the statute *Quia Emptores*, because not only do we find some evidence of it in so ancient a document as 'Domesday Book,'<sup>\*</sup> but otherwise the freeholders of a manor would (except when reaping the benefit of some particular usage) have been unreasonably limited to a right of common pasture for *commonable* and no other cattle. But when through that statute feoffments of ancient arable land ceased along with the creation of manors, and common appendant to ancient arable land was no longer possible, except so far as it existed already, common appurtenant became the more usual freehold right of common, and depending upon a grant, or upon a prescription which presupposes a grant, claimed to be distinguished from, and to be ranked as superior to, the right of common by custom, the only one allowable in favour of copyholders who cannot prescribe in their own name by reason of the meanness of their estate.

The saying that the statute of Merton<sup>†</sup> confirmed the Common Law admits of more than one sense. The question is whether it interpreted the Common Law rightly. It does, indeed, declare the obligation on the part of the lord to leave sufficient pasture for his freeholders; but in reading its provisions it is impossible to get rid of the impression that, on the whole, it was a one-sided piece of legislation. No criterion was laid down for determining what *sufficiency* of pasture might

<sup>a</sup> *e. g.* "Copyholders may of common right take estovers, to be expended upon their copyholds, where a custom to this effect exists in the manor, but not otherwise." Cooke, *op. cit.* p. 30 (ed. 1846); 2 Brown, 329; 2 Saund. 320; 1 Ventr. 123, 163.

<sup>\*</sup> Also *vide* Bracton, *passim*, lib. iv. cap. 38.

<sup>†</sup> 20 Henry III. c. 4.

really be; but no particular stress should, perhaps, be laid on this omission, as probably *levancy* and *couchancy* might be found by an assise to be practically a satisfactory rule of admeasurement. The *confirmation* of a Common-Law right of the lords to approve the residue of the waste would virtually amount to an extension of that right, while the freehold tenants were left in no better position than before. It would seem, from the expressions used in the Act,\* that the commoners had previously been in the habit of bringing assises of novel disseisin against lords for inclosing without leaving a sufficiency of pasture, and had often succeeded in obtaining damages from them. We may, therefore, naturally suppose that it was the then very powerful influence of the barons which prompted the framing of the statute.

To condemn any legislative enactment as *obsolete* is a dangerous proceeding, for its obsolescence can only consist in its continued non-observance or violation. On the contrary, if its provisions seem applicable to present circumstances, means should be devised for enforcing them and for checking hitherto successful wrongdoers. The provisions of the statute of Merton are not applicable to present circumstances, and it is only in this sense that we can call them obsolete, or rather we should so style them because cases have long since ceased to arise which could properly be subjected to their operation. Now, when an Act being cited in each particular case which *primâ facie* appears to come under it is on each occasion proved to be inapplicable, it is high time for the Legislature to consider whether any cases at all can now possibly recur which may be determined by any of the clauses of such Act, and whether the several cases likely to arise from time to time in future, and to involve the necessity each time of disproving the applicability of the Act in question, should not be, as it were, collectively anticipated by a repeal of the Act.

Bracton, who was a judge towards the end of the reign of Henry III., and may, therefore, be taken as the most competent contemporary interpreter of the legal intention of

\* 20 H. III. c. 4, s. 2: "Whenever such feoffees do bring an assise of novel disseisin," &c.

Ibid. s. 5: "And the disseisors shall be amerced, and shall yield damages, as they were wont before this provision."

the statute of Merton, introduces it as<sup>a</sup> “quædam constitutio quæ dicitur constitutio de Merton, per quam etiam invito eo cui servitus debetur, communia coarctatur.” He adds:—“imprimis videndum est qualiter constitutio illa sit intelligenda, ne male intellecta trahat utentes ad abusum . . .” He determines that it does not apply to freemen entitled to a right of common, on lands of one manor by virtue of their holding lands of another, but only to such as have been enfeoffed by the owner of the soil who wishes to approve. Whenever, in fact, the common is not appendant (and, consequently, not exclusively of pasture for commonable cattle) and incident to the feoffment, but appurtenant or in gross, and derived from a special grant, or claimed by prescription, which supposes a special grant, the consent of the parties entitled to the right of common must be obtained before the approvment can take place, except the terms of the grant were such, or may be inferred from continual usage to have been such, as reserved a power of inclosing in favour of the owner of the soil. The grantor is bound by his own grant, though not by an abuse of it on the part of the grantee.<sup>b</sup> A feoffee against whose common appendant or appurtenant the lord approves is entitled not only to a mere sufficiency of pasture, but to a perfectly free and easy power of access to such pasture. (“Item si qualitercunque usus fuerit vel feoffatus large vel stricte, si locus competenti usus fuerit, *et sive coarctari possit sive non*, non tamen coarctari debet cum damno et gravamine ad locum longius distantem, cum distantia inducant incommoditatem. Et eodem modo *coarctari NON DEBET, NISI VELIT si accessus sit difficilior.*”) In estimating the extent or limitation of a right of common according to the terms of a grant, great importance is attached to long usage or custom approved of by the neighbours and owners of lands. (“Longus usus vel consuetudo a vicinis approbata et dominis, *quæ pro lege observari debet inter tales.*”) We shall have to notice again the fact that Bracton employs the Roman term *servitus* (or “easement”) for a “right of common,” and asserts that there can be a *local*

<sup>a</sup> Bracton, lib. iv. cap. 38, s. 15.

<sup>b</sup> “Tales non ligat constitutio memorata, quia feoffamentum non tollit, licet tollat abusum, et maxime propter consensum eorum voluntarium qui servitutem

*et communium concesserunt.*”

Cf. Year Bk. Edw. I. (31st yr. 1303), where it was adjudged that the lord cannot approve against the terms of his own grant.

*servitus*, and for the benefit of *uncertain* persons, as, for instance, of a collective body or corporation of inhabitants of boroughs and cities. ("Item localis [poterit esse servitus] et non certis personis, sicut alicujus universitatis, *burgensium et civium*, et omnes conqueri possunt et unus sub nomine universitatis.") And finally, Bracton tells us that in the case of strangers or persons not belonging to the manor<sup>c</sup> on the wastes of which they claim right of common, their user is to be preferred to the statute; if they have used their right largely,<sup>d</sup> or without restriction as to particular portions of the waste or as to kinds and number of beasts, because their user ought not to be approved against; but in the case of rights of common belonging to tenements within the manor of the lord who is desirous of inclosing, the statute is preferred to the user of the commoners. ("Et in fine hujus constitutionis notandum, quod in extraneis personis præfertur usus constitutioni, si large usi sunt, quia ab usu coarctari non debent. In propriis vero tenementis præfertur constitutio usui.")

The statute of Merton did not and could not contemplate customary estates or copyholds, the existence of which was permitted, but not legally recognised, in the reign of Henry III. We have already noticed above,<sup>e</sup> how long it took before copyholds obtained such recognition.)

It is no matter for wonder, therefore, that copyhold rights of common found no place in the statute of Westminster the second (18 Edw. I. stat. 1, c. 46,) but some mention of them might reasonably have been expected in the 3 and 4 Edw. VI. c. 3.<sup>f</sup>

<sup>c</sup> "*Extraneos, qui non nisi communiam clamare possunt in tenemento.*"—s. 14.

<sup>d</sup> "*Videndum erit utrum feoffati fuerint large, scilicet per totum, et ubique, et in omnibus locis, et ad omnimoda averia et sine numero.*"—s. 16.

<sup>e</sup> *Vide* p. 390, *supra*.

<sup>f</sup> "By the Stat. of West. 2, it is declared, that by occasion of a windmill, sheep-cote, dairy, enlarging of a court, necessary, or curtelage, none shall be grieved by assize of novel disseisin for common of pasture. This Act has been liberally construed by the courts, and Lord Coke says that the five cases above mentioned are put only for examples. It seems clear that a lord may build a

house for himself or his herdsman upon the waste, without reference to sufficiency of common left, and this although the inclosure for the building should absorb two acres out of a common consisting of but three. *Nevill v. Hamerton*, 1 Sid. 79; 1 Lev. 62, S. C.; 2 Keb. 283, 314, S. C."—G. W. Cooke, *op. cit.* p. 53.

"It must be remembered, however, that the statute applies only to common of pasture. Other commons, such as turves or estovers, must not be injured by such building. *Duberley v. Page*, 2 T. R. 391; and see *Shakespeare v. Pepin*, 6 T. R. 747."—*Ibid.* p. 53.

By these two statutes the 20 Henry III. c. 4 was extended or enforced, not, however, from any motive of particular favour towards the lords, but because the inclosure of waste lands for tillage or regulated pasture seemed necessary for the improvement of agriculture, in order to meet or effect an increase of population.

The customs of many manors had gained consistency in the 17th century, and in some cases were reduced to writing. In these last we read of ancient and considerable claims to various rights of common by copyholders.<sup>s</sup> Such customs consisted in practices or privileges which the oldest tenants alleged or remembered to have been handed down from time immemorial. The details of a custom may be conceived to have been in a state of constant growth or more and more expansive development, except it was altogether dropped by non-user, till it was established in a fixed form by writing: and therefore in the earlier stages of their existence they might be so comparatively insignificant as to remain quite unnoticed by the Legislature.

In the evidence given concerning Wimbledon Common before the Select Committee of the House of Commons, in March, 1865, it was asserted<sup>b</sup> that "a partial inclosure might be effected under the lord's Common-Law right of approvement; another inclosure might be effected under the custom of the manor, for the lord to inclose with the consent of the homage; it might be done by the Inclosure Commissioners, or by a special Act." The same witness who gave this evidence admitted a

<sup>s</sup> *Vide, e. g.*, apud Faulkner's Hist. and Antiq. of Kensington: "The Ancient Customs between the Lord of the Manor of Earl's Court and the Tenants belonging to the same Manor" (1610), amongst which we read, "Item, We may dig loame, sand, or gravel in the common, to use within the manor, as often as we need." *Ibid.* p. 429, under "Customs of the Manor of Abbot's, Kensington," at a court held 18th April, 1672, "Item, We present that the ancient customs belonging to the free and copyholders, is that they may cut turfs for their own use within the manor, upon the waste grounds, or dig sand, gravel, clay, loome, for their own use, to be used within the same manor at any time."

*Vide* also, Customs of the Manor of Painswick, contained in a decree of the Court of Chancery in a suit between the Lord of the Manor and the Copyhold Tenants, (Stroud, 1810?). It is there stated, that previous to the reign of Elizabeth the privileges of the tenants, which were originally as various as the dispositions of different lords, became in great measure fixed, the customs, however, depending on the memory of the parties interested; and that these customs, when approaching to certainty, were, in the 28th of Eliz. "remembered and agreed upon" between the lord and tenants, and reduced to writing.

<sup>b</sup> Rep. i. 845.

right of common to belong to such copyholders only as occupied "an ancient cottage, that is to say, a cottage that existed before the time of legal memory," but he ignored any such rights in favour of the freeholders. Without entering more minutely into details, we may observe that such views as the above-mentioned imply the ranking of copyhold rights before those of freehold tenants, as well as a preference of the authority of a special custom to that of an Act of Parliament.

Let us, for the sake of argument, suppose the utter absence of freehold commoners. We are met then by the question whether the lord has power of approvement against his copyhold tenants under the statute of Merton, which did not contemplate any but freeholders. If, notwithstanding the partiality of those in power towards inclosures, it was deemed right and expedient to treat expressly by statute of the rights of common annexed to freeholds by the Common Law or general customs of the land, it might be doubted whether rights which were not noticed by the statute of Merton, because in law they did not exist at its date, could be said strictly to come under its operation.<sup>1</sup> Copyhold rights of common being of posterior growth, but owing their force to local customs, which, like the general customs, or Common Law, suppose, in each case, an Act of Parliament, or a law made in former times by an equivalent power, might in time have justly claimed an express enactment ensuring moderation with respect to approvement against them on the part of the lords; and if copyholders, when at last fully recognised by the law, were not strictly entitled to the benefit, neither could they strictly be bound by the adverse provisions, of the Act. This point, however, need not be strongly pressed, because, in actual practice, whenever advantage has been taken of the statute of Merton by lords for purposes of inclosing, no distinction seems to have been made between copyhold and freehold commoners as to the leaving of a sufficiency of common. Let us, then, further suppose, or even admit, that the lord can approve against copyhold commoners under the statute of Merton,

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<sup>1</sup> In *Smith v. Harrington* (Sid. 41, 73), it was adjudged that copyholds were not within the statute 11 Henry VII., because when that statute was made, copyholders were so little esteemed in the law, that they were accounted *villeins*, or, in the best acceptation, but *tenants at will*.



subject to the same conditions as are expressly required in the case of freehold commoners. It cannot, however, be allowed that a special custom can override an Act of the Legislature.<sup>k</sup> If a statutory law forbids the approvement of the whole waste by the lord, a local custom is bad which pretends to give the lord power to inclose the whole waste without even considering whether sufficient pasture be left for the commoners, provided only that he obtain the consent of the homage. And, moreover, if the statute of Merton was an "affirmance" of the Common Law, and a sufficiency of pasture was, in such cases as we have often mentioned above, annexed to the lands of tenants as of common right, such a custom in making the consent of the homage, as it were, absolute in authority, is opposed to common right, as well as unreasonable on the ground of its utter inconsistency with an existing right of common.<sup>l</sup>

If<sup>m</sup> it is not a good custom for the lord to grant out every part of the waste without restriction to be held for the first time by copy of court-roll, as trenching too much upon the general common-right of the tenants, a custom for the lord to inclose generally with the consent of the homage can be no better in law. A special custom of the former kind, indeed, has been considered good as to *portions only* of the waste; but such a limitation implies the necessity, in some degree at least, of consulting the commoners; and, accordingly, a particular mode of consulting them is defined by the custom of some manors in making it essential to the validity of the grant of any portion, that the assent of the *homage* be previously obtained. But it may be presumed that even a custom to grant out *portions* of the waste, and that not without the consent of the homage, cannot legally be enforced against the will of freeholders entitled to common by virtue of their holding ancient arable land, except the lord prove that there is a sufficiency of common left for them according to the provisions of the statute of Merton; nor either against a freehold title by grant or prescription, except the express terms of the grant, or the quality and extent of the usage, prove or imply an original reservation by the lord

<sup>k</sup> Co. Litt., 113a; *Noble v. Durell*, 3 T. R. 271.

<sup>l</sup> *Vide Ariett v. Ellis*, 7 Barnw. and

Cressw.

<sup>m</sup> *Vide* Stephen's Blackstone, vol. i. p. 637, and the authorities there cited.

of such rights and powers as he now claims by custom. The term "ancient *arable* land" has, it seems, always been interpreted by the law in favour of the freeholders. Such land need not now be, nor even have been for a long while back, in a state of tillage,<sup>a</sup> but it gives a good title to common appendant, if it was time out of mind (the legal mind; of course) plough-land, and parcel of a manor before the statute *Quia Emptores*.<sup>o</sup> Such a title would appear to be inextinguishable even by non-user;<sup>p</sup> for it was by Common Law, and is by Common Law, so long as Common Law exists, appended to the freehold land of the kind above mentioned as a matter of course. The fact that such land may long since have been turned into pasture without losing its arable character in the eye of the law, may well be taken for a proof of the correctness of our opinion. For if a freeholder converts into pasture a parcel of land the arability of which, to his knowledge, entitles him to a proportionate use of the common lands of the manor, such conversion on his part, but for the exception in favour of his and any similar case, tends clearly to become a non-user amounting to a renunciation of the right.

But were it possible to extinguish a freehold right of common in a thousand ways, there would still remain for legal consideration the essential character of the relations of the different kinds of tenants with the lord of the manor and with each other. The sketch attempted to be given of these relations in the preceding pages of this Essay need not here be repeated to show that, as in other respects, so as regards the inclosure of commons, no positive or constructive act on the part of the copyholders through their customary court or homage can bind the freeholders, or supplant the superior authority of their court-baron.

However strong may have been the influence of the feudal system in England while it lasted, or however marked its effects after its substantial dissolution, there are very early traces of a progressive public policy in the acts of the Legislature. This policy might often, or even in most cases, be a mistaken one; but generally speaking its primary principle, its object, was the

<sup>a</sup> Tyrringham's Case, 4 Co. 36 a.

<sup>o</sup> 18 Ed. I. c. 1.

<sup>p</sup> Vide Tyrringham's Case, 4 Co. 36 a.

public good, notwithstanding that its secondary principles, the means chosen by it from time to time for the attainment of that object, might be calculated to produce the very reverse of what was desired. Society made a very great step in advance when free labour began so far to supplant the employment of serfs in agriculture as to necessitate an ordinance in the 23rd year of Edward III., regulating its price, according, it is true, to very erroneous notions of political economy, but still not without an evident regard to the national welfare. Towards the close of the 14th century, agriculture, which had been a fashionable pursuit in the reign of Edward I., had fallen into a most wretched condition.<sup>a</sup> There could have been but little inducement to inclosing waste lands, when a famine had rendered such a proceeding useless by greatly reducing the number of able-bodied men,<sup>b</sup> of whom there does not seem to have been, even previous to that calamity, a supply equal, much less superior, to the demand. The representation of cities and boroughs, as it became more settled, naturally introduced and fostered views of government less and less exclusively favourable to such close interests as those, for instance, of lords of manors and their tenants in their mutual and strictly feudal relations.

It is conceivable that, as in France<sup>c</sup> or other parts of the Continent, so, though to a less extent, in England, the great barons would find it convenient to allow, and even to encourage, the formation of villages in the immediate neighbourhood of their castles. These villages might by special grants or otherwise obtain a variety of privileges, among which we may here particularly notice that of using "village greens" for purposes of recreation. It is not easy for any man to control the subsequent development of that which he originated only in the hope of checking its further growth or progress at a certain predetermined point. Thus villages, by a series of stages, grew into towns, and towns in their turn became *large towns* and cities. Of course, this process could not but cover a long interval of time; but the ultimate result was unavoidable, and part of that result now is the comparatively modern distinction

<sup>a</sup> Vide Sir Fredk. Eden, 'State of the Poor' (ed. 1797), vol. i. pp. 16, 17, 48; Hallam, Mid. Ag. vol. iii. pp. 177, *seq.*

<sup>b</sup> Hallam, *ibid.* p. 177.

<sup>c</sup> Cf. Guizot, *Civilis. en Fr*

between a town life and a country life, between manufactural and agricultural interests.

The monasteries in Europe had always been most industrious in the inclosure and cultivation of waste lands. Their suppression in England under Henry VIII. produced a partial but most important revolution in the state of landed property. The feudal system must have indeed received a fatal shock from the tumultuous events of the 15th century, to have rendered it possible in the 16th, in spite of deep-rooted prejudices in favour of freehold rights, to despoil of so many baronial tenures that church by which the spirit of feudalism had been sustained no less than modified.

The consequences of this spoliation, as regards the progress of agriculture, doubtless in great part suggested the enforcement of the statute of Merton by the 3rd and 4th Edward VI. c. 3.

Towards the middle of the reign of Elizabeth there prevailed the practice of inclosing, as regulated pastures, lands which had formerly been used in tillage.<sup>1</sup> On the supposition that such a practice created a decay of husbandry, attempts were made to check it by frequent proclamations. And yet the practice seems to have been wiser than the enactments made against it; for there were complaints of a dearth of cattle, and not of corn. This state of things, which, so far as corn was more plentiful than cattle, bore some resemblance to present circumstances, was opposed to the old maxims of the Common Law as well as to the policy of the Legislature.

'Tyrringham's Case,' which is the leading case as to the law of rights of common, is concluded by Lord Coke with the following words: "Nota, reader, it is true that agriculture and tillage is greatly respected and favoured as well by the Common Law as by the common assent of the king, lords spiritual and temporal, and all the commons in many Parliaments. The Common Law prefers arable land before all other, and therefore for its dignity it ought to be named in a præcipe before meadow, pasture, wood, or any other soil; and it appears by the statute of 4 Henry VII. c. 19, that six inconveniences are introduced by subversion or conversion of arable land into pasture, tending to

<sup>1</sup> Eden, *op. cit.* i. p. 109 n; also, a Dialogue in the Harleian Miscell. vol. viii.

<sup>2</sup> Mich. 26 and 27 Eliz. K. B. 4 Co. 36 a. Tud. L. C.

two deplorable consequences. The first inconvenience is the increase of idleness—the root and cause of all mischiefs. 2. Depopulation and decrease of populous towns, and maintenance only of two or three herdsmen, who keep beasts in lieu of great numbers of strong and able men. 3. Churches, for want of inhabitants, run to ruin and are destroyed. 4. The service of God neglected. 5. Injury and wrong done to patrons and curates. 6. The defence of the land, for want of men strong and inured to labour, against foreign enemies weakened and impaired. The two consequences are: These inconveniences tend to the great displeasure of God. 2. To the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to be one of the greatest commodities of this realm, which one Act of Parliament as to this purpose may, as a figure in arithmetic in the third place, stand for a hundred; but I have observed that the most excellent policy and assured means to increase and advance agriculture, is to provide that corn shall be of reasonable and competent value; for make what statutes you please, if the ploughman has not a competent profit for his excessive labour and great charge, he will not employ his labour and charge without a reasonable gain to support himself and his poor family.”

The “populous towns” of those days could ill afford to be depopulated, and the first Poor Laws made in the 27th and 43rd years of the respective reigns of Henry VIII. and Elizabeth prove the great numbers of idle vagrants who infested the country, especially after the dissolution of monasteries.

There was and could be no fear of all or even any considerable part of the open spaces round towns being, as it were, swallowed up by buildings;\* for speculation in this respect could not have thriven while there was no superabundance of inhabitants, and while citizens and burghers were content with narrow streets and small houses, either because by dwelling closer to each other they felt safer in the absence of an efficient police, or because they had not as yet tasted the sweets of modern comfort and luxury. On the other hand, there was a

\* But see Hallam, *Const. Hist.* (8th ed.) vol. ii. p. 26, as to proclamations against erecting new houses under Elizabeth and Charles I.

reasonable fear of a scarcity of provisions for towns, which could not easily be reached by the rustic purveyor, compelled as he was to pass across uncultivated moors or wildernesses, and destitute of any but slow and rude means of transport.

There might be plenty of room for inclosures without, and sometimes even within, the precincts of a town, while it did not occur to question the right of the public to enjoy their pastimes and sports on the different extensive commons which lay temptingly open on every side, because it was then scarcely possible to foresee that such enjoyment would, or might at some future and yet very distant time, be deemed to jar with the somewhat exaggerated claims of private individuals. But it seemed an obvious mode of turning the presence of idle vagrants to account, to provide them with agricultural employment by inclosing portions of what then appeared to be an unlimited and otherwise useless supply of uncultivated land, especially where such vagabonds were most dangerous, in the more immediate neighbourhood of towns or populous districts.

The political revolutions which took place in the seventeenth century were hardly more wonderful or beneficial than the changes which have been accomplished since the close of that age in rural life and in cities. In the year 1685 nearly half the area of the kingdom consisted, or was believed to consist, of moor, forest, and fen.\*

Such waste tracts as Hounslow Heath and Finchley Common, which lay on the great routes near London, were haunted by mounted highwaymen, perhaps more romantic, certainly far more formidable, than the tramps and gipsies, who, at any rate, have not been *quite unanimously* condemned as a wholly intolerable nuisance. The † one and apparently exceptional case of manslaughter reported in the "Times" of 27th October, 1864, as having occurred in Epping Forest, presents a happy contrast with the fact that "the Cambridge scholars trembled when they approached Epping Forest, even in broad daylight."‡

From the commencement of the reign of Queen Anne to the 37th year of the reign of George III. there were passed 1766

\* Vide especially Macaulay's Hist. of Eng. vol. i. c. iii. Mar. 1865, 5331-5333, and App. thereto.  
 † Reports of the Select Committee, 382.  
 ‡ Macaulay's Hist. of Eng. ch. iii. p. 382.

private Acts directing the inclosure of 2,837,873 acres of waste land.<sup>b</sup> In the reign of Charles II. only four provincial towns contained as many as 10,000 inhabitants. It has been computed that in our times above one sixth of the nation is crowded into provincial towns of more than 30,000 inhabitants.<sup>c</sup>

If the constitutional struggles of the seventeenth century, the abolition of military tenures,<sup>d</sup> and the equalisation (in a social, if not in a strictly legal or technical sense), of copyhold and common socage estates, had materially altered the relations of lords of manors with the Crown and with their tenants before the close of that age, the relations of landowners with the public have since then been no less remarkably improved by the progress of education, commerce, and political economy. However important a position London may have occupied from the earliest times, it is known that as the feudal knights had preferred the pursuit of arms to that of agriculture, so the country gentlemen, who filled their places, preferred rural business and pleasures to life in a capital. Each county-town, however, was viewed as a kind of *metropolis* by the worthy squires who possessed and resided on estates within the same county. But where is the lord of the manor, the country gentleman, or squire, the landowner now, who would not be ashamed to confess that he had but rarely visited or felt little or no interest in that greatest of all central seats of empire, than which none is, or, we venture to affirm, ever was, more worthy of being styled, according to the *literal* meaning of the term ΜΗΤΡΟΠΟΛΙΣ, the mother-state? From London, and into London, branch out and converge, like the railways on a map of England, a host of ever-multiplying, ever-expanding interests, rights, and duties.

In the year 1795 the subject of inclosures was again taken into special consideration by Parliament.\* It was alleged that the scarcity of grain, owing to more or less unfavourable seasons since the year 1754, as well as to the increased population, consumption, and luxury of the people, could only be remedied

<sup>b</sup> Cf. Rep. of the Select Committee, 1797, on the cultivation of waste lands, and p. 346, particularly about Sheffield.

<sup>d</sup> 12 Car. II. c. 24.

pp. 54, *seqq.*

\* *Vide* Reports from Select Committee, 1795, 1797, 1800.

<sup>c</sup> Macaulay, Hist. Eng. ch. iii. p. 336,

by rendering the division and drainage of waste and as yet unproductive lands less troublesome and expensive, and that the necessity of applying for a private Act in each case was the chief obstacle in the way of necessary improvements. The conversion of considerable tracts of arable land into pasture had not been compensated by a corresponding conversion of pasture into arable land; and the nation had therefore been reduced to a precarious though partial dependence on foreign countries for its supply of bread-corn. Every argument was urged from a purely agricultural point of view; although particular stress was laid on the ultimate benefits which would accrue to the public from the advantages gained by individual proprietors. No approach was made to the notion of any of the commons being the "lungs" of the Metropolis or of large towns. But in drawing attention to the condition of London, it was only shown that its supply of grain was unequal to its increased population, as evidenced by its increased consumption of meat. At the same time that to the increase of population was partly ascribed the necessity, so generally deprecated in that age, of importing corn from foreign countries, it was argued in favour of inclosures that these would tend to augment population. With no less inconsistency the further assertion was made, that as much grain as was then imported might be raised by an extension of inclosures: as though the effectual reduction of waste lands into cultivation were the affair of a moment, and importation would cease to be requisite, notwithstanding that its principal cause (the increase of population) would still continue in force through the agency of the very remedy supposed to be applicable to the subsisting evil.

If the preservation of commons near London is now desired for the better defence of the country through the maintenance of the Volunteer force in as complete a state of discipline and efficiency as possible, it was then, on the contrary, declared that "the best defence the capital can have is not to suffer a spot of unclosed ground to remain between it and the coasts in its neighbourhood."<sup>1</sup>

The evidence on which the reports of the Select Committees of 1795, 1797, and 1800 were based, is most remarkable for the great

<sup>1</sup> Report, 1795 (p. 33, Appendix B, | be contrasted with the practice of the conclusion of Rep.) This opinion may | ancient Germans. *Vide supra*, p. 401.



importance attached by it to "the benefits resulting to population from inclosing."<sup>g</sup> We read that were "each man's right specifically divided, the most must then be necessarily made of the property in each person's possession, and the number of small occupiers of land would still continue, which would be a great advantage to population and the community at large;"<sup>h</sup> and again, that it would be advisable to pass "a General Act of Parliament to ascertain the rights of the lords of the manor, tithe-owners, and the several tenants,"<sup>i</sup> and to "enable the lord, who is most frequently the more enlightened, and better able to advance the various expenses of inclosing and other necessary improvements, to purchase these rights as a jury should value them, and thus make it worth his while to erect farm-houses and other conveniences; as, without some such power of purchasing, the wastes would be found in most places too small to admit of as many divisions as there would be claims given in, or the ground would be allotted to people unable, from want of experience or property, to render their little portions of much service to the public or to themselves." It will be seen that, as to the continuance of the number of small occupiers, the first of these quotations contradicts, in some degree, the conclusion of the last, and expresses an opinion contrary to that prevailing in our day, which sees large farms preferred to small ones. By reason of such preference, indeed, we may even now approve of the purchase by the lord of the rights of the several tenants, but only in purely agricultural districts. As regards the commons near the Metropolis or large towns, it can ultimately make no real difference whether the result of inclosing an open space be its dedication to building purposes, as it were, wholesale by one person, or in retail by a number of petty speculators. We are, indeed, under the obligation of not disparaging the generosity evinced towards the public by some living lords, but we are under the still greater obligation of protecting the public interest against any possible encroachment on the part of their posterity.

The General Inclosure Acts,<sup>k</sup> passed for the regulation of

<sup>g</sup> Report, 1795. (App. B. p. 35 of Rep.)

<sup>h</sup> Ibid. p. 37 (as to Dorset).

<sup>i</sup> Ibid. (as to Essex).

<sup>k</sup> 41 Geo. III. cap. 109; 3 and 4 Will. IV. c. 87; 3 and 4 Vict. c. 81.

private Acts before the date of the 8 and 9 Vic. c. 118, were framed according to the opinion expressed by the Select Committee of the year 1800, *viz.* "that it would tend much to reduce the expense, both of drawing and copying the Bill [of inclosure], and of printing and engrossing it, if all such clauses as should appear from the general practice to be necessary and usual in all Bills of Inclosure were to be incorporated into one general Act, and be thereby declared to be applicable (*mutatis mutandis*) to all future inclosures, to be made under the authority of Parliament, as to all such matters as should not be otherwise specially provided for by the particular Bill."<sup>1</sup>

Malthus, at the beginning of the present century, became the leading representative of a new era of practical thought. His spirit, we may say, more or less pervades the legislative measures which have since been enacted, from time to time, with a view, directly or indirectly, to the relief of the poor. He made it a truism to say that all fair expedients should be adopted to prevent an increase of population disproportionate to the existing means of sustenance. Such grievances were prominently brought forward as the over-crowded state of the cottages of labourers in agricultural districts, and of the dwellings of workmen in the great centres of manufacturing industry. It began at last to be expressly acknowledged, that those who usually lived in an atmosphere of smoke had as much need of occasionally issuing into fresh air as of eating and drinking. Thus the 6 and 7 Will. IV. c. 115, while facilitating the inclosure of common fields or lands, whether arable, meadow, or pasture, "known by metes and bounds, or occupied according to known or legal rights," excepted from its provisions all *wastes* in England or Wales, and all places within ten miles of London, or within certain distances of other large towns comprising a certain amount of population.<sup>m</sup>

The 8 and 9 Vic. c. 118 also recognises the expediency of facilitating "the inclosure and improvement of commons and other lands now subject to rights of property which obstruct cultivation and the productive employment of labour;"<sup>n</sup> and

<sup>1</sup> *Vide Rep. 1800* (at p. 81 of Reports, 1795, 1797, 1800).

<sup>m</sup> 6 and 7 Will. IV. c. 115, s. 55.

<sup>n</sup> s. 1.

goes farther than any previous Act in saving expense and trouble to landowners or commoners by the establishment of a regular Board of Commissioners, and by the provision,<sup>o</sup> that all such inclosures of wastes as shall have been recommended by the commissioners in their annual report, and assented to by the Legislature, shall be comprehended under a *public general* Act. It lays down the distinction, however, that while all lands upon which severalty rights attach may be inclosed by the authority of the commissioners, waste lands upon which there are no severalty rights must be reserved for Parliament.<sup>p</sup> But its characteristic principle is a regard, not only to the advantage of proprietors, but "to the health, comfort, and convenience of the inhabitants of cities, towns, villages, or populous places, in or near any parish in which the land proposed to be inclosed, or any part thereof, shall be situate."<sup>q</sup> Through such regard (which,<sup>r</sup> in the case of London, is measured, as it were, by a radius of fifteen miles, and in the case of other cities or towns by certain distances, varying from four to two miles, in proportion to the population of each city or town), the Act renders the inclosure of shack-lands and stinted pastures, no less than of wastes or common lands, conditional upon the assent of Parliament, and enjoins the preservation of town greens and village greens,<sup>s</sup> and the appropriation of allotments "for the purposes of *exercise and recreation* for the inhabitants of the neighbourhood."<sup>t</sup>

Now, as formerly, there is strictly no legal obstruction to the exercise, by the lord of a manor, of his power of approval under the statute of Merton, subject to such limitations and doubtful interpretations as have been noticed above. The 8 and 9 Vic. c. 118 does not touch the extremely rare and barely possible case of the lord and the commoners unanimously agreeing to inclose the waste lands of a manor and parcel them out among themselves. But the lord, as owner of the soil, has an absolute veto confirmed to him, even if the commoners are all consentient in favour of inclosure. The necessity of applying to the commissioners, or, through them, to the Legislature, arises when a minority of interests, not exceeding one-third in

<sup>o</sup> s. 32.<sup>p</sup> s. 12.<sup>q</sup> s. 27.<sup>r</sup> s. 14.<sup>s</sup> s. 15.<sup>t</sup> s. 30.

value, and not including the lord's, is opposed to the majority of not less than two-thirds. Parliament here interposes somewhat after the fashion of a "*Deus ex machinà*." This interposition cannot be described as a boon granted in consideration of a corresponding favour. The parties interested are divided in twain among themselves, and one of them, the majority, or party of action, prevails upon a third party, not directly interested in the land, to coerce the other, the minority or conservative party, but that third party exacts its own price for the transaction. Now, if the third, or not directly interested party, is not in some paramount position of authority over both the contending parties, and is not by some acknowledged right a sovereign distributor of equity, such a practice deserves no very complimentary name, for it amounts to the securing of a profit or advantage by an alliance with the stronger party with a view to the imposition of its will upon the weaker. Arbitration it is not, because an *arbitrator*, as such, is chosen by the consent of *both* parties; and, in this case, one of the two parties does not apply for, and would not if it could possibly help it abide by, the decision of the third. It would seem, therefore, pretty clear, that when the lord and the commoners are all consentient, the whole matter is left to take its strictly legal course; but that when a considerable majority of interests apparently runs the hard risk of being sacrificed to a minority, in the absence of a purely *legal* provision for such an eventuality, Parliament sees room for an equitable arrangement, and exercises its supreme authority in carrying it out. But equity does not admit of any partial application. The minority is compelled to desist from its unreasonable opposition; while the majority which received, must also give full satisfaction to, equity. Thus on the ground of equity, if not of law, the sovereign representative of the public and guardian of every public interest, enforces those rights which an exclusive adherence to Common Law might otherwise paralyse, but could not utterly destroy," *viz.* the

\* Similarly, in the case of a married woman's equity to a settlement, if the intervention of a court of equity be in any way called into action, the court will inquire into all the circumstances of the marriage, and not allow the husband to receive the property without his

settling on the wife a certain amount, according to the directions of the court. The right of the public, moreover, may, like that of the wife, have been far less extensive in its historical origin than it is at the present day.

rights of inhabitants of towns to the enjoyment of the neighbouring commons for purposes of exercise and recreation. From this point of view, it would appear to be only an excessive attachment to received notions of Common Law that still causes the unanimous agreement of the lord and the commoners (which, fortunately, is scarcely known ever to occur in practice), to be preferred to any rights to which the public may be entitled. Indeed, we venture at once to pronounce it both just and expedient that Parliament should assume a direct control over a larger area than that actually fixed by the 14th section of the 8 and 9 Vic. c. 118, with respect to inclosures of commons round London or large towns, so as either to prevent such open spaces from being inclosed at all, or to direct allotments to be made, for purposes of recreation, more proportionate in extent to the population and general requirements of the neighbourhood.

The assertion, however, that the general public enjoy some equitable rights, need not imply an admission that inhabitants as such enjoy no *legal* rights whatever over the commons near London or large towns for purposes of exercise and recreation. The arguments urged against such legal rights would not seem to be altogether irrefutable.

In the first place, the use of an open space by inhabitants for purposes of recreation differs in kind from the use of the same by commoners, whether for depasturing cattle, or for timber or fuel, or for gravel, or the like, and the former use may therefore not require the same kind of title to sustain it as the latter. Some of the Roman lawyers, in the age of Justinian,\* treated the *jus pascendi* as a *servitus*, which term is generally equivalent to the English "easement."

Bracton, who borrowed much from the Roman law, employs *servitus* and *communia* indiscriminately for a "right of common." If we have, therefore, some authority for saying that the use by commoners is of the nature of an easement, there is as much, or rather more, reason for applying a similar description to the use by inhabitants; but the former differs from an easement where and so far as it amounts to taking a profit *in alieno*

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\* Inst. II. iii. 2.

*solo*—while the latter always continues to be an easement, though in a more or less extended sense, in that it never amounts to taking such profit. From this point of view, more than from any other, the law might favour the rights of the public over open spaces for purposes of exercise and recreation. There is no right, perhaps, so easily established by usage as a right of way.

It is difficult to account for the distinction made by lawyers between a user by the public of a way or path, and a user by the public of an open strand or waste.<sup>7</sup> For the user of a way may be so continuous or frequent as to amount to a temporary occupation of the land over which it is exercised, scarcely in a less degree than the user of a waste for walking or riding or for games. From a constant and peaceable enjoyment of a right of way by the public it is allowed to infer an original dedication or grant to the public; and yet, in opposition to a constant and peaceable user of an open space or common by the public, it is alleged that the public, or inhabitants as such, cannot take by grant, and therefore cannot enjoy, any prescriptive rights either.

Whatever rights may belong to inhabitants must be based on usage time out of mind or on a special dedication or grant. Usage is either local, that is, belonging to a place in general, in which case it is a custom; or personal, that is, belonging to a person individual or corporate, in which case it is a prescription. A custom for any one but a copyholder to take a profit *in alieno solo* is bad in law; but this rule does not apply to inhabitants claiming to enjoy a common by way of recreation, for they do not claim a profit *in alieno solo*. On the other hand, Bracton<sup>\*</sup> seems to allow to inhabitants (*burgenses, cives*) a right of common (*servitus*) by custom, if stress is to be laid on the phrase "*non certis personis*," as well as by grant or prescription, if we trans-

<sup>7</sup> Cf. Shelford's Real Property Stats. *ad v.* "Prescription," where it is held that, a user by the public of an open strand or waste does not necessarily lead to the inference that the owner has abandoned his right to it and given it to the public; and though a dedication of a way to the public may be *partial* or limited as to the sort of way (e. g. a

horseway), yet there cannot be a *qualified* dedication to the public subject to a power of resumption by the grantor, for that would be the reservation of a right inconsistent with a dedication to the public. (See *Fitzpatrick v. Robinson*, 1 Huds. and K., and other cases there cited.)

<sup>\*</sup> *Vide supra*, p. 408.

late *universitas* strictly into "corporation" and not merely into "a collective body," and if *cives* and *burgenses* really allude to corporate cities and boroughs. But it is said that anciently (and therefore probably in Bracton's age) the term "borough" did not in itself imply *incorporation*.<sup>a</sup> On the whole, as Bracton seems to comprise under *non certis personis* the three instances of *universitas*, *cives*, and *burgenses*, and as these, if constituted into corporations, would not be "uncertain persons" in the eye of the law, we venture to hold that Bracton considered inhabitants as such, that is, by reason of commorancy in a certain place, capable of enjoying a right of common by *custom*. In 7 Ed. IV. c. 26 it is pleaded that all the *inhabitants* within such a town time out of mind, &c., have used to have *common* there, &c. In 18 Ed. IV. c. 3 it is asserted that *all the inhabitants* of a town may well prescribe. The question was, therefore, by no means settled. Danby held that a township might *prescribe* for a right of way to the church; but according to Littleton such right of way should be pleaded by way of *usage*, a term somewhat ambiguous, as it might mean either custom or prescription, though it is to be presumed that Littleton meant the former. In 1593 (36 Eliz.) all the judges declared against a custom as well as a prescription for inhabitants to have common, on the ground that usage might be alleged by reason of inhabitancy to have an *easement* but not to have an *inheritance*.

It may be questioned whether a right of common, or any other right when enjoyed by *custom*, is an *inheritance*. Rights of common appendant and appurtenant come only indirectly through the land to which they are annexed under that description. A right of common in gross is the only one directly claimed as an inheritance through an original, real or supposed, grant; but being by *grant to a particular person or body of persons* it cannot be by custom, which applies to a *place* in general. Thus

<sup>a</sup> Vide Stephen (Blackstone), vol. iii. p. 152 n. Vide also Hallam, Mid. Ag. *passim*; Merewether and Steph. Hist. of Boroughs, *passim*. Hallam, Const. Hist. vol. iii. p. 43, quotes a passage from Luder's 'Reports of Election Cases,' part of which is very much to the point here:—"At that time [in the reign of Edu. I.] every inhabitant of a borough

was called a burgess; and Hobart refers to this usage in support of his opinion in the case of Dugannon. The manner in which they exercised the right was the same as that in which the inhabitants of a town at this day hold a right of common, or other such privilege, which many possess who are not incorporated." Cf. *infra*, p. 427.

a copyholder as such enjoys his rights of common by the custom of the manor, which is local, and not by way of inheritance, which is personal. Neither does an inhabitant as such, therefore, when he claims a right by *custom*, claim it by way of *inheritance*. So far as we can abide by the authority of one precedent,<sup>b</sup> we may notice a further analogy between common enjoyed by copyholders and common enjoyed by inhabitants. A copyholder as such cannot *prescribe* for common in his own name, but is capable of the benefit of a prescription by, or in the name of, the lord of the manor. Likewise, in that case, Vaughan, J., said:—"Though inhabitants cannot prescribe for common in their own names, yet they may be capable of the benefit of such a prescription; and as this prescription is laid upon the mayor and burgesses, they may prescribe for them and for the inhabitants, and this is the direction given, in 15 Ed. IV. c. 29, by Littleton."

In the cases above mentioned the expression *inhabitants* meant *inhabitant householders*, who, paying scot and bearing lot of their town, might well be entitled to the benefit of its privileges. The framers of the 8 and 9 Vict. c. 118 seem to have in some degree borne this in mind. The 27th section provides that the commissioners shall not certify the expediency of a proposed inclosure without the consent of two-thirds in number of such freemen, burgesses, or inhabitant householders resident in any city, borough, or town, or within seven miles thereof, as shall be entitled to rights of common or *other interests* in the land proposed to be inclosed. When any clause of an existing Act of Parliament is expressly or by implication pronounced nugatory, every point should be duly weighed which may tend to prove the contrary. To say the least, it may be doubted whether, in the present instance, the user of inhabitants will not be a sufficient interest to render their consent necessary.<sup>c</sup>

A custom for the inhabitants of a parish to dance in a certain close at all times in the year *for recreation*<sup>d</sup> has been held a lawful usage. The question, therefore, becomes one of degree, or of extent of territory. If such a custom is good for a parish

<sup>b</sup> *White v. Coleman*, Freem. 134; *vide* Cooke, *op. cit.* p. 33.

<sup>c</sup> *Vide* Cooke, *op. cit.* p. 126 n.

<sup>d</sup> Stephen's Blackstone, vol. i. p. 684. *Abbott v. Weekly*.



extending over, say, ten miles, would it be a good custom for the inhabitants of so vast an area as that of London? If a negative answer be given on the ground of the constant and indefinite increase of the population and area of London, it may be observed that a *parish* is no less capable of extending its limits and multiplying its population in a proportionate degree. This is the more evident when we consider that London is nothing but a huge aggregate of parishes, and the dimensions of each part must grow with those of the whole. If, on the other hand, it be said that an aggregate of parishes cannot enjoy rights of which a single parish is capable, then, according to such a method of reasoning, it must be denied that a corporation aggregate can prescribe for rights of which a corporation sole or a single person is capable, inasmuch as a corporation aggregate is not necessarily limited to a fixed number of individuals; but its character may remain as definite as ever, although it may at one time consist of ten, at another of a hundred members.

The doctrine that "inhabitants cannot prescribe" is based on the general position that every prescription presupposes a grant, and a grant cannot be made to inhabitants. We read, however, in Merewether and Stephen's 'History of Boroughs and Municipal Corporations,'\* that "innumerable precedents could be cited of grants to the *good men (probis hominibus)* of towns and places in all parts of the present empire," of a date anterior to the time when charters of incorporation had come into fashion,<sup>f</sup> and that, moreover, Lord Coke asserts such grants were made.

If a charter of incorporation is necessary in order to enable the inhabitants of a city or town or of a particular parish to hold lands to them and their successors, it should be remembered that there occur frequent instances of corporations existing by prescription,<sup>g</sup> in the case of which a general grant of incorpo-

\* Vol. iii. p. 1538 (ed. 1835), cf. Co. Litt. 3a. Vide also Mer. and St. vol. i. Intro. p. xxv. p. 56, as to the Saxon charters granted to the "*burghwara*" ("*inhabitants of the borough*"); and p. 285, as to William I.'s grant of a charter to the *burghwara* of London, which is not in that charter styled a *city*.

<sup>f</sup> Vide Blomfield's Hist. of Norfolk, vol. iii. p. 80, as to alleged grants by kings of England (before Edward III.,

1329) of the city and its waste ground to the citizens, to be held by fee-farm in inheritance.

<sup>g</sup> Mer. and St. vol. ii. p. 1010, (Ninth Year Book, Edward IV.):—" . . . The doctrine of corporations by implication became general; thus it was assumed by the courts of law in their decisions, that a grant of land to the burgesses, citizens, and commonalty of any place, was sufficient to incorporate them by

ration is presupposed, and the legal charter is presumed to have once been in existence, but to have since been lost or destroyed through some accident or other. No incorporation can take place without the consent of the Crown; but that consent need not always be expressed, but may be implied in much the same way in which certain acts omitted or committed on the part of the lord of a manor have the legal effect of enfranchising a copyhold tenant.

The inhabitants, as such, of large towns, therefore, cannot be said to be in so disadvantageous a position as some have supposed with respect to their rights over the surrounding commons and open spaces for purposes of recreation, provided, of course, they can prove such constant and peaceable user as would be deemed valid under the provisions of the 2 and 3 Will. IV. c. 71. If we allow that the general public, or, to speak more accurately, or in a somewhat more restricted sense, inhabitants, as such, may *lawfully* make a claim either by custom, or by prescription or grant, we must also allow that the Prescription Act is applicable to their case. It is, however, a question of considerable importance under which of the several heads comprised under that Act their rights are to be ranged. The first section treats of "any right of common or other profit or *benefit to be taken and enjoyed from or upon any land*;" under the second section we read of "any way or other easement, &c. &c., to be

inference."—*Ibid.* p. 1014 (9th Yr. Bk., Edw. IV.):—"In an action of trespass, the defendant justified by saying, 'that there is a certain land in Dale and Sale, where all the *inhabitants* within the town have been accustomed to inter-common upon account of vicinage.' It was objected, that they could not prescribe for such a privilege, unless they could show a *corporation* in them, by the name of the *inhabitants*, and thus make them capable to prescribe:—but it was answered, 'that it would suffice to plead an *usage*, for that was a good plea; for instance, that Dale was an *ancient borough*, and all the lands and tenements within, &c., are and have been devisable and devised from time immemorial.' This case is important . . . as distinctly establishing, that the earliest notion of 'incorporations' was founded upon the assumption, that

the 'INHABITANTS' were *incorporated*;—and so far from its being allowed that incorporation was necessary for the prescription alleged in this case, it seems with more correctness to have been asserted that where there was an ancient borough—that is to say, a borough by prescription, of which we have pointed out numerous instances—then, as the borough had existed from time immemorial, so also might there be immemorial customs within it—to be proved by *recent usage*, which is evidence of such usage having existed from time immemorial, unless anything could be shown to the contrary." It may be further observed, that the charter of William I. declared the burgesses, &c., of London "*legales homines*," and thus expressly rendered their lands and tenements *devisable*.

enjoyed, &c. &c., upon, over, &c. &c., any land." A right of straying generally over a common for recreation may be styled a "*benefit* enjoyed upon" such land. On the other hand, it is hardly distinguishable from, and has, by one of the highest judicial authorities, been actually treated as, an *easement*. Lord St. Leonards is reported to have said:—"The *servitus spatiandi* over open ground, which has in some measure been devoted to public use, is also intelligible and known to law."<sup>a</sup> We have seen that even a right of common was by Bracton termed a *servitus*. But a "right of common" is contained under the first head in the Act, and therefore distinguished from such easements as are specified or comprised under the second head. We therefore find mentioned under the first head a right which has, at least by some lawyers, been thought to partake of the nature of an easement, and we may therefore infer that the more general expression, "benefit to be enjoyed upon any land," so far as it is less definite than "any right of common, or *other profit* to be taken and enjoyed from or upon any land," &c., is less distinguishable from an easement in general, while in so far as it is more definite than, it is also actually distinguished from, the easements specified or comprised under the second section. The *servitus spatiandi* recognised by the law, according to Lord St. Leonards, would appear to signify the less definite user of open spaces by the public or by the inhabitants of large cities for such more general purposes of health and recreation as walking or riding. The town greens or village greens, the legal existence of which lawyers more readily acknowledge, would seem more particularly to answer the description of common lands upon which a *benefit* may be *enjoyed*. A village green has been described as that (by no means very extensive) part of a common across which there is a footway and upon which the village boys play cricket or other games.

Lord St. Leonards has been cited also on the subject of village greens (in the case of *Dyce v. Lady Jane Hay*):—"If there be a piece of ground uninclosed (not that I mean to say inclosure would make any difference, unless there was an exercise of adverse right) and dedicated from time immemorial

<sup>a</sup> In *Dyce v. Lady Jane Hay*; vide Rep. of Sel. Com. 1865, 28.

to the public, from which a custom may be laid for sports generally, or for village recreation, those rights will remain untouched and be unassailable, be the fate of this case what it may." Owing to the comparatively small extent of ground dedicated or supposed to be dedicated to the public, and to the smaller and more easily ascertainable number of legal claimants, as well as to the more definite character of the benefit claimed to be enjoyed, in the case of village greens, lawyers have not displayed towards these that disrespect which they have evinced against a *servitus spatiandi* or a public right of straying or roaming over an open space or large common, exceeding a mere right of way by a road or footpath. It is but a poor argument, and one scarcely, if at all, to the point, against the rights of the general public, to say that not even a *commoner as such* has any right to go upon a common, except to put his beasts there. The commoners have *their* rights; and the public, or the inhabitants of London or of other large cities and towns, have, or may have, *theirs*; the former may be entitled to their common rights only for the purpose of depasturing their beasts, or of providing their cottages with fuel, or repairing their tenements and instruments of tillage; the latter may be limited to the enjoyment of an easement or of a right very much akin to an easement, only for purposes of healthy exercise and recreation. The exercise of the rights of either party is quite consistent with the exercise of the rights of the other, subject however to the necessity of proving, in cases of apparent inconsistency,<sup>1</sup> which is the dominant right.

The conclusion which we venture to draw is, that under the first section of the Prescription Act we may rank the rights of inhabitants of towns and villages to the enjoyment of their respective town greens and village greens, while to the heads comprised under the second section we may more properly refer the *servitus spatiandi*, or right of the public, or of inhabitants of large cities and towns, to the enjoyment of large open spaces or entire commons. Such conclusion would place the inhabitants of London and large towns in a position more advantageous<sup>2</sup>

<sup>1</sup> e. g. In the case of the lord or the commoners claiming a right to dig gravel.

<sup>2</sup> That is, 20 or 40 years' user in the former case, and 30 or 60 years' user in the latter, would save their respective

(as regards the facility of proving their prescriptive or customary rights) than that occupied by the inhabitants of small towns or by villagers, in proportion to the superior necessity or expediency of protecting the wider and more national interests, and of securing or extending the more indispensable rights, of the former.

The rights of commoners in waste lands near large towns, and more especially near the Metropolis, are subject to various and peculiar causes of decay, which, if not turned by the prompt and prudent action of the Legislature (aided by the good will and efforts of the commoners and inhabitants) to the advantage of the public, are by the stern rules of the Common Law, as viewed by technical interpreters, rendered so much clear gain exclusively in favour of the lord of the manor in each particular case. Railway Companies can schedule a whole common without giving notice to the Inclosure Commissioners:<sup>1</sup> for these have no *locus standi* to be heard upon Railway Bills before a Parliamentary Committee.

Parishes having rights of digging gravel under the General Highway Act, exercise them in so inconsiderate a way as to deprive the common lands of their former qualities as pastures.<sup>m</sup> A similar result follows from the constantly increasing use of these open spaces for purposes of recreation by the general public, against whom the commoners have failed hitherto to take any legal steps, and to whom they have thus virtually transferred their rights. The necessities of an inevitable traffic have caused those gates to be destroyed which used to prevent the cattle from straying out of the commons. Building speculations or encroachments put the evidences of the rights of the commoners more and more out of sight. Thus all traces are gradually lost of ancient arable land and tenements to which rights of pasture, or rights of estovers or turbary, were first annexed.

The lord's interest, therefore, so far from requiring protection, tends to encroach upon the rights of the commoners and of the general public. It were absurd to prove the existence of these

rights from being defeated by their commencement being shown as posterior to the 1st year of the reign of Richard I.

<sup>1</sup> e. g. In the case of Wandsworth

Common. Rep. of Sel. Com. 1865, 197-199.

<sup>m</sup> e. g. Wandsworth, *ibid.* 5704, 5737-5741, *et al.*

rights without recognising the necessity of preventing their lapse or violation. One of the simplest and yet not least effective remedies might most probably be found in some well-considered system of registration. As against the lords, the maintenance of the common rights of the tenants would seem sufficient to prevent inclosure. As against the barely possible agreement of lords and commoners to inclose, we need only obtain the declaration and final establishment of the rights of the public. Nothing then remains to be done but to apply to Parliament for such a scheme of management,<sup>a</sup> as shall ensure the constant preservation of each common in a condition most favourable to the free exercise of every right attached to it, as well as to the health of the neighbouring population.

The question of compensation for the cession of private rights to the public is one which could only be entertained on the erroneous assumption that the public either have not, or, if they have, could not prove and enforce, any paramount rights over open spaces. A jury by awarding the full building value of the land would be virtually legalising the abuse by lords or commoners of the facilities which the legislature vouchsafed for the furtherance of the public good, not of mere building speculations. Neither could a private individual fairly claim an immediate capital in return for an alleged abandonment of a purely contingent benefit, which could not otherwise be realised without the consent of all parties interested, and without very considerable delay, trouble, and expense. The public should employ its capital for more general and necessary purposes, and not, as it were, imitate the Merchant of Venice, who ran the risk of giving, not his pound of flesh only, but his very life-blood. Could a lord or commoner be harsher or more successful than a Shylock?

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<sup>a</sup> Under the Metropolitan Commons Act, 1866, to which (as well as the Crown Lands Act) the writer was pre-

vented from referring by his absence abroad.

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